No. 2028 In Equity

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

J. I. Lamprecht and F. M. Aiken, Trustees,
Appellants,
vs.
Southern Pacific Railroad Company, Kern Trading and Oil Company, and T. S. Minot,
Appellees.

BRIEF FOR APPELLANTS.

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STATEMENT OF THE CASE.

This cause is brought into this court on appeal from a decree entered in the Circuit Court for the Southern District of California, Northern Division, sustaining the demurrer of the appellees to the cross bill of complaint of the appellants and dismissing the bill.

The Southern Pacific Railroad Company and the Kern Trading and Oil Company are corporations organizing and existing pursuant to the laws of the state of California. [R. 110-111.]

The cross bill was filed for the purpose of having cross complainants' title quieted, and the facts alleged in the cross bill and admitted by the demurrer are, briefly stated, as follows:

By an Act of Congress approved July 27, 1866, the United States made a grant of land to the Atlantic and Pacific Railroad Company for the purpose of aiding in the construction of its road, and by the 18th section of the same act made a similar grant of lands to the Southern Pacific Railroad Company subject to all the conditions and limitations provided in the grant to the Atlantic and Pacific Railroad Company. [R. 114.]

The 3rd section of the act which specifies the term and conditions of both these grants reads as follows:

> "And be it further enacted, that there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold,

reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers; provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act; provided further, that the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act; provided further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road, *and within twenty miles thereof* may be selected as above provided;

"And provided further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal; and provided further, that no money shall be drawn from the treasury of the United States to aid in the construction of the said 'Atlantic and Pacific Railroad.'" [R. 112.]

The fourth section of said Act of Congress, which provides for the issuance of patents under the grants, reads as follows:

"Sec. 4. And be it further enacted, that whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United

States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the president of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid." [R. 115.]

Section six of the act provides for a survey designed and intended to fix the primary and lieu limits of the grant and to designate by odd numbers the sections granted, and reads as follows:

"And be it further enacted, that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled, 'An Act to secure homesteads to actual settlers on the public domain,' approved May

twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company." [R. 116.]

Thereafter Congress passed a joint resolution approved June 28, 1870, which reads as follows:

"Be it resolved, etc., that the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the president, as provided in the act making a grant of land to said company, approved July twenty-seven, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seven, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act." [R. 117.]

Prior to the 9th day of May, 1892, certain citizens of the United States qualified by law to make valid locations of mining claims upon the public domain, located as

placer mining ground the lands in controversy in this suit, which are described as follows:

"All of section 11, 13, 23 and 33, township 19 south, range 15 east, Mount Diablo base and meridian, and all of section 5, township 20 south, range 15 east, Mount Diablo base and meridian, all situated in Fresno county, California." [R. 111.]

and performed thereon all acts necessary to make placer mining locations covering all of said lands, provided said lands were then public and open to locations under mineral laws. Said lands were known to be mineral lands ever since 1865, of which the Southern Pacific Railroad Company and the Kern Trading and Oil Company at all times had notice, and that the latter company was organized for the purpose of developing said lands and other mineral lands which the Southern Pacific Railroad Company claimed under said grant. [R. 118.]

Prior to the 9th day of May, 1892, Coalinga Mining District was organized and all of the locations made as aforesaid were recorded prior to the 9th day of May, 1892, in the office of the recorder of said mining district, which was the proper place for recording them under the rules, regulations, customs and usages of the miners of that district, and that all of the lands in controversy in this suit were included in the boundaries of that mining district. [R. 118.]

There has never been any law, state or federal, in force in said mining district requiring location notices to be recorded either in the local land office at Visalia, in which district said lands are located, or in the General Land Office at Washington prior to the time application was made for patents of mining claims. [R. 119.]

On the 9th day of May, 1892, the Southern Pacific Railroad Company, by its duly authorized land agent, made an *ex parte* application for patent of about 440,900 acres of land claimed by the railroad company under its grant, including the lands involved in this suit, and said application states that the land so applied for enured to the company for the construction of its road for a continuous distance of 40 miles and 559/1000 of a mile, ending at Alcalde, California. [R. 120-122.] The railroad was not completed beyond Alcalde, and the portion thereof last above mentioned was the last road completed by the company under its grant, and the grant of all lands opposite and coterminous to the uncompleted portion of the road was forfeited by Act of Congress approved the 29th day of September, 1890. The railroad did not at the time of making its application or afterwards request that the mineral or non-mineral character of any of the lands for which it applied be determined before issuance of the patent. [R. 122.] On the 14th day of May, 1892, the registrar and receiver of the local land office at Visalia certified that they had examined the list of lands for which patent was sought and tested the accuracy thereof by the plats and records of their office, and that they found same to be correct; that the filing of said list of lands was allowed and approved and that the whole of said lands were public lands of the United States within the limits of twenty miles on each side of the line of said road and that the same were not nor were any part thereof returned and denominated as mineral lands nor claimed as swamp lands, and that there was not any homestead, pre-emption, state or other valid

claim to any portion of said lands *on file or on record in said local land office.* [R. 122.]

Prior to the 27th day of June, 1894, the officers of the General Land Office examined said list of lands in connection with the records and plats of the General Land Office and found that the lands described in said list fell within the twenty mile lateral limits of said road, and that they were, so far as the records of the General Land Office showed, "free from conflict," but the officers of the Interior Department had not had, for the examination of said lands, sufficient opportunity to determine whether any of them were or were not mineral lands or to justify a statement by them in a patent of the United States that they were non-mineral. Neither the officers of the local land office at Visalia nor the officers of the General Land Office or the Interior Department ever found or determined that all of said lands were non-mineral, or decided or attempted to decide whether they were or were not mineral lands. [R. 123.] Under these circumstances the Commissioners of the General Land Office, in conformity with the rulings and decisions of the Interior Department which were then in full force and effect, and which had been followed by the officers of that department in such cases for 40 years, recommended to the then Secretary of the Interior as follows, to-wit:

"It is hereby recommended that the tracts described" (in said list) "covering 440,900.85 acres, be approved and carried into patent as the lands falling within the grant by the act as aforesaid to the said Southern Pacific Railroad Company of California, excluding, however, from the approval and from the transfer in the patent that may be issued 'all mineral lands' should any such be found in the tracts aforesaid; but this exclusion, accord-

ing to the terms of the statute, shall not be construed to include coal and iron. [R. 124.]

G. W. LAMOREAUX,
Commissioner."

And the then Secretary of the Interior approved said recommendation as follows:

"Approved; covering 440,900.85.

HOKE SMITH, *Secretary.*"
[R. 124.]

There was no other or further finding, determination, recommendation or certification by any officer of the Interior Department prior to the issuance of the patent as to the mineral or non-mineral character of any of said lands, all of which were included in the patent hereinafter mentioned. [R. 124.]

On the 10th day of July, 1894, in pursuance of said recommendation and its approval, the officers of the Interior Department charged by law with the duty of preparing and issuing patents under said grant, executed and thereafter delivered to the Southern Pacific Railroad Company the patent pleaded in this cause, which includes in its description the lands here in controversy. [R. 125, 135.] The patent recites the existence of said act and joint resolution and the grant thereby made; that by them "provision is made for granting to said company 'every alternate section of public land designated by odd numbers *to the amount of twenty alternate sections per mile* on each side of said railroad on the line thereof, and within the limits of twenty miles on each side of said road' 'not sold, reserved, or otherwise disposed of by the United States, and to which pre-emption or homestead

claim may never have attached at the time the line of said road is defintely fixed' "; that it appeared from the records of the land office that the road from San Jose to Tres Pinos and from Alcalde to Mojave, together comprising 252 miles and 479/1000 of a mile, had been constructed as required by law and accepted by the president; that the lands applied for had been listed under the act by the duly authorized land agent of the Southern Pacific Railroad Company; that said tracts of land (describing them) lie *coterminous to the constructed line of said road.* The granting clause of the patent reads as follows [R. 135]:

> "Now, know ye, that the Unted States of America, in consideration of the premises and pursuant to the said Acts of Congress, have given and granted and by these presents do give and grant unto the said Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land selected as aforesaid and described in the foregoing. Yet excluding and excepting 'all mineral lands,' should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall be construed to include 'coal and iron lands.' " [R. 125.]

No notice, constructive or actual, was given to any of the prior mineral locators of said lands of said *ex parte* application for patent, nor was there any publication of the application, nor was there any hearing ordered or had in the local land office or the General Land office or anywhere else for the purpose of allowing any person having an interest in, or claim upon any of said lands to be heard in the defense of their rights to or claim upon said lands [R. 126], and said prior mining locations were never cancelled. [R. 127.] The Southern Pacific Rail-

road Company accepted said patent without protest and caused the same to be recorded as evidence of its title [R. 127]; none of the lands in controversy in this suit are within the limits of twenty miles of any completed section of twenty-five consecutive miles of the railroad as required by the fourth section of the act and by said joint resolution and are not coterminous with any completed section of twenty-five consecutive miles of the line of said road, but that all the lands here in controversy lie opposite and coterminous to an uncompleted section of twenty-five consecutive miles of said railroad line. Prior to the certification of said list of lands and the issuance of the patent, the railroad company had received from the United States for the construction of its railroad land to the amount of more than ten alternate odd numbered sections per mile for all the railroad it has ever constructed under this grant. [R. 128.]

On the third day of March, 1909, certain citizens of the United States qualified by law to locate and acquire title to public mineral lands under the mineral laws of the United States, entered upon the lands in controversy in this suit, and relocated them as placer mining ground and performed thereon all the acts necessary to establish valid mining locations upon said lands covering all of the same, provided said lands were then public lands, which cross-complainants allege they were, and caused their location notices to be duly recorded as required by law. [R. 129.] Neither the Southern Pacific Railroad Company or the Kern Trading and Oil Company had ever, prior to the beginning of this suit, been in actual, open, notorious, exclusive, continuous or hostile posses-

sion, or any possession whatsoever, of any of the lands here in controversy in this suit [R. 130]; these lands are worth upwards of $60,000 and that the cross-complainants have acquired an undivided 9/10 interest in all the mining claims last above mentioned, which is worth upwards of $50,000. [R. 131.]

Upon this state of facts the cross-complainants pray the cloud cast upon their title by said patent be removed and that their title may be quieted to said lands, and that the court decree that neither the Southern Pacific Railroad Company nor the Kern Trading and Oil Company, nor the cross-defendant, T. S. Minot, who claims to have some right, title or interest in the property, have any right, title or interest in or to said lands or any part thereof. The defendants, Southern Pacific Railroad Company and Kern Trading and Oil Company demurred to the cross bill upon the following grounds:

That the cross bill does not state a cause of suit and that its allegations do not entitle cross-complainants to any relief or discovery, and set up as a special defense the first section of the action of Congress approved March 2, 1896, entitled "An Act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes" (29 Stat. at large, 42), and especially claimed that this suit is barred by the following sections of the Code of Civil Procedure of the state of California, section 318, which reads as follows:

> "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his

ancestor, predecessor, or grantor, was seized or possessed of the property in question within five years before the commencement of this action."

Section 319:

"No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made."

Section 320:

"No entry upon real estate is deemed sufficient or valid as a claim unless an action be commenced thereupon within one year after making such entry, and within five years from the time when the right to make it descended or accrued."

Section 321:

"In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title for five years before the commencement of the action."

Section 338:

"Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture;
2. An action for trespass upon real property;
3. An action for taking, detaining, or injuring

any goods or chattels, including actions for the specific recovery of personal property;

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Section 343:

"An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

Also, that this suit is barred by laches.

The cross-defendant, T. S. Minot, appearing *In Pro. Per.,* demurred on the following grounds generally that the cross-complaint does state a cause of action against him; that there was a misjoinder of parties; that the bill shows no right, title, or interest of the cross-complainants which can be enforced against him in this suit. That the cross bill is uncertain and duplicious and does not show the nature of the suit or its purpose. That the cross bill shows a non-joinder in that it does not show why cross-complainants did not join as plaintiffs in the original bill. That the cross bill seeks no discovery and sets up no defense which might not be taken by answer. That the cross-complainants have no authority from the United States to institute or maintain the suit. That the cross bill does not sufficiently specify fraud. That the cross bill is ambiguous, repugnant and paradoxical and is not intelligent. That it does not state the nature of the trust, that it is multifarious, that it does not give the addresses of the cross-complainants and does not show privity of entering between the cross-complainants and cross-defendant, T. S. Minot.

That the cross bill is defective in that its several paragraphs state only conclusions of law.

The questions of law argued and submitted in the court below were:

1. Whether the Interior Department had authority in law, before cancelling the prior mining locations on the land, to pass to the railroad company title to the land freed from the right of citizens to acquire title to the land by location under and in compliance with the mining laws.

2. Whether the patent issued is effective to keep the title of defendants limited to lands non-mineral in fact.

3. Was the grant of lands to the amount of ten alternate sections per mile of road as stated in the act, or to the amount of twenty alternate sections per mile of road as stated in the patent?

4. Did the fact that the land in controversy lie opposite to and coterminous with an uncompleted section of twenty-five consecutive miles of the road deprive the Interior Department of jurisdiction to issue patent to the railroad company for the land before the twenty-five mile section opposite and coterminous to it was completed after the forfeiture act approved September 29, 1890.

5. If the patent was void or voidable when issued, has it been validated and confirmed by acts of Congress so that it is now effective:

(a) According to its terms and import, or

(b) As an absolute convenience of all the lands described in it.

The court below held:

1. That cross-complainants are not in privity with the United States.

2. That there is no authority of law for the insertion in the patent of the clause, "Yet excluding and excepting 'all mineral' lands, should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include 'coal and iron lands.'"

3. That the patent issued created a conclusive presumption that the officers of the Interior Department had decided before issuing the patent that all the lands therein described were non-mineral, and that such presumed decision constituted a complete and final adjudication, not open to rebuttal, that the land is non-mineral.

The court below did not pass upon any other questions of law raised by the demurrer and argued.

The demurrer of S. T. Minot was sustained and the cross-complaint dismissed as against him for the reason that the court was of the opinion that no one but the railroad company and the Kern Trading and Oil Company had any title, right or interest in the land or any part thereof.

ARGUMENT.

We will discuss the questions of law submitted in the court below in the order above stated:

1. IT WAS NOT WITHIN THE POWER OF THE INTERIOR DEPARTMENT, BEFORE CANCELLING THE PRIOR MINING LOCATIONS, TO PASS TO THE RAILROAD COMPANY TITLE TO THE LAND FREED FROM THE RIGHT OF CITIZENS TO ACQUIRE TITLE TO IT BY LOCATION UNDER AND IN COMPLIANCE WITH THE MINING LAWS.

It cannot be denied that:

1. A valid mining location upon public mineral lands vests in the locator thereof the right of exclusive possession of the land located, and confers the further right to acquire title in fee of the land located by compliance with the provisions of the mineral laws.

2. Mining claims are universally recognized as interests in real property and pass by deed and inheritance as such.

3. The mining laws operate through the locations of the claims as a grant of these rights to and interests in the lands located to the locator.

4. That said rights and interests are property, in the fullest sense of the term.

Belk v. Meagher, 104 U. S. 279, 284;
Gwillim v. Donnellan, 115 U. S. 45, 49;
Noyes v. Mantell, 127 U. S. 348;
Clipper Mining Co. v. Eli Mining Co., 194 U. S. 220, 226;
Forbs v. Gracy, 94 U. S. 262, 267;
Mannel v. Wulff, 125 U. S. 505, 510;
Black v. Elkhorn Mining Co., 163 U. S. 445.

It was held in *Barden v. Northern Pacific,* 154 U. S. 288, that locations, under the mining laws of the lands, which are in fact mineral and in odd sections within the limits of a railroad grant, are effective to exclude the land so located from the grant, if the location be made at any time before the patent issued, upon an adjudication by the Interior Department that the land located is non-mineral. The cross bill alleges and the demurrer admits that the lands here in controversy were and are mineral in fact and that they were located as above specified. They were therefore excluded from the grant by such locations which were of record as required by law, and were in full force and effect at the time the patent issued.

The grant was made by the statute and not by the patent, which is only evidence of title.

Desert Salt Co. v. Tarpey, 142 U. S. 240;
Wisconsin Central v. Price Co., 133 U. S. 406.

There is nothing in the patent in the nature of a warranty of title or ownership of the land by the United States and therefore any interest in or right to acquire an interest in it as mineral land, outstanding at the time the patent issued was not passed by the patent, which could *grant* nothing. If the rights enuring to the mineral locators under their locations were subsequently forfeited to the United States, they could not by either the patent or the statute pass to the railroad company because both the statute and the patent in terms exclude all mineral lands from the conveyance.

If it be true, as held in the Barden case, that the effect of the location of a valid mining claim upon the land before patent issued upon an adjudication that the

land was non-mineral excepted the land so located from the operations of the statute which made the grant, it is difficult to perceive how the patent, which was not intended to grant anything, and which does not purport to grant or otherwise pass title to mineral lands, has the effect of granting or passing title of such lands or bringing them under the operations of the statute, especially when it in terms states that it does not do so.

All public offices and all tribunals are limited in point of power and the nature and character of the final acts and judgments by the law under which they assume to act, and if such act or judgment transcends the power conferred by law, it is a nullity.

Bigelow v. Forrest, 9 Wallace 339;
Windsor v. McVeigh, 93 U. S. 274;
Ex parte Lang, 85 U. S. 163;
United States v. Walker, 109 U. S. 258.

The only means by which the railroad could acquire title to these mineral lands under the grant would be by a decision of the proper officers that the lands were non-mineral and the issuance of a patent upon such decision; such decision and patent would render the lands non-mineral within the meaning of the statute and pass title to them.

Barden v. N. P. R. R., supra.

The patent issued is effective to keep all lands which are mineral in fact excluded from the grant.

The granting act is a special statutory law, complete in itself, designed and intended exclusively to apply to and control the transactions for which it provides; its

operations and effect are not subject to any rules of common law, applicable to private conveyances, or controlled or determined by the provisions of general statutes, which are not in terms applicable to the particular transactions for which the special statute provides.

Congress has full power, in granting public lands by special statute, to grant such estates therein upon such conditions as it deems advisable. To assert otherwise would be to deny the legislative authority vested in Congress by the Constitution. That its conveyance does not conform to the rules of common law or to the provisions of other statutes is of no consequence. The granting statute is itself the law which exclusively controls the title and, in case of conflict, supersedes both the rules of common law and the provisions of general statutes which control other conveyances of public lands made by patent.

This grant is by an elaborate special statute, which shows clearly the intention of Congress that other laws should not determine its operations. This is peculiarly true of all railroad grant land statutes, because in them are found provisions to govern all the details of the transactions contemplated by them. The granting statute under consideration is the most definite, complete and elaborate railroad land grant statute passed by Congress, and under the rules of statutory construction, must be held to preclude the application of other laws to its special subject matter.

General statutes for the conveyance of public lands provide that the officers of the Interior Department shall convey parcels of lands of specified character to individuals having specified qualifications upon satisfac-

tory proof of performance by the applicants of specified duties. In such cases a decision by the officers of the Interior Department that the applicant has the proper qualifications, and has performed the duties which entitle him to the land, and that the land is of the character for which patent is authorized by the statute, is in each instance necessarily pre-requisite to the *grant, which is made by the patent,* and which such general statutes provide shall be unconditional when made.

In such cases there is no authority of law for a conditional grant, and hence none for a conditional patent.

But in the case at bar the grant is *in praesenti* by the statute, and is, *by the statute, which is the law* of the conveyance, made subject to the condition, also *in praesenti,* that the grant does not attach if the land is mineral. Congress had ample authority to make such a grant and it made none other, nor did it authorize the officers of the Interior Department to change the grant which it made, or to make any other or additional grant.

While the appellees do not openly contend that any of these general statutes have superseded this special granting act, yet they do so in effect, by citing cases defining the effect of patents issued under such general statutes, and contending that because such patents create a presumption that the land described in them is of the character authorized by such *general statutes* to be conveyed by such patents—that therefore, in this case, the patent which contains a clause excepting mineral lands, and which was issued after the grant, from which mineral lands are excluded, was made by the special statute —that such patent creates a presumption that the lands described in it are non-mineral.

This is an ingenious method of applying the provisions of general statutes in this case in order to secure title, under this special granting statute, to lands which the special statute forbids to pass by or under it.

That appellee's title must be established, if at all, by the provisions of this special granting statute, and not by the provisions of any other law is too clear to require argument, but as, in the court below, they assumed otherwise and prevailed; we will note here the extent to which special statutes and special exceptions in statutes are held to survive, as against general statutes and general provisions therein. This principle of law is best exemplified in those cases where the question was whether a special statute had been superseded by a later general statute dealing with the same subject.

In Rogers v. United States, 185 U. S. 83, 87, the court says:

> "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not effect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly made, or unless the provisions of the general are manifestly inconsistent with those of the special. In *Ex parte* Crow Dog, 109 U. S. 556, 570, this court says:
>
> "'The language of the exception is special and express; the words relied on as a repeal and general and inclusive. The rule is *generalia specialibus non derogant*. "The general principle to be

applied," said Bovill, C. J., in Thorpe v. Adams, (L. R. 6 C. P. 135), "to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together." "And the reason is," said Wood, V. C., in Fitzgerald v. Champenys, (30 L. J. N. S. Eq. 782; 2 Johns. & Hem. 31, 54), "that the legislature having its attention directed to a special subject and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do." '

"In Black on Interpretation of Laws, 116, the proposition is thus stated:

" 'As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all.'

"So, in Sedwick on the Construction of Statutory and Constitutional Law, the author observes, on page 98, with respect to this rule:

" 'The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.'

"And in Crane v. Reeder, 22 Michigan, 322, 334, Mr. Justice Christiancy, speaking for the Supreme Court of that state, said:

" 'Where there are two acts or provisions, one of which is special and particular and certainly includes the matter in question, and the other general, which, if standing alone would include the same matter and thus conflict with the special act or provision the special must be taken as intended to constitute an exception to the general act or provision especially when such general and special acts or provisions are contemporaneous as the legislature is not presumed to have intended a conflict.'

"Both the text books and the opinion just quoted cite many supporting authorities."

This principle of law confines us to this special granting statute and its operations and to cases arising under it and similar railroad land grant statutes in determining whether the title to the land in controversy ever passed the grant.

THE STATUTORY GRANT, BEING *in praesenti*, PASSED THE TITLE GRANTED AS OF ITS DATE, OF ALL LANDS WHICH WERE, AT THE DATE OF THE FILING OF THE MAP OF DEFINITE LOCATION, OF THE DESCRIPTION AND CHARACTER SPECIFIED IN THE STATUTE AS GRANTED.

In St. Paul & Pacific v. Northern Pacific, 139 U. S. 1, 5 (1890), the court, discussing this proposition, says:

"This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion."

To the same effect are:

1874: Schunenberg v. Harriman, 21 Wall. 44, 60 Leavenworth Lawrence &c. Railroad Co., 97 U. S. 491;

Railroad Co. v. Baldwin, 103 U. S. 426.

See also:

Southern Pacific Railroad Company v. United States, 183 U. S.

THE TITLE GRANTED IS ABSOLUTE, PROVIDED THE LANDS ARE NON-MINERAL WITHIN THE MEANING OF THE STATUTE, BUT IT IS NOT ABSOLUTE UNLESS AND UNTIL THE LANDS ARE NON-MINERAL WITHIN THE MEANING OF THE STATUTE.

The language of the statute is so clear and specific upon this proposition that citation of authorities would seem unnecessary, if defendants did not claim that this grant, made *in praesenti* by statute, containing an exception *in praesenti*, of all mineral lands, known or unknown, from its operations, operated to pass to them, as the date of the grant, the lands in controversy which they admit to be mineral, because an executive officer issued a patent, stating therein in effect that it passed title to no mineral lands, which should be found in the tracts described therein. To show that the statute, before the patent issued, did not pass title to mineral lands, we quote from Barden v. Northern Pacific, 154 U. S. 288, 316.

> "It seems to us as plain as language can make it that the intention of Congress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time

known to be mineral. After the plaintiff had complied with all the conditions of the grant, performed every duty respecting it, and among other things that of definitely fixing the line of the route, its grant was still limited to odd sections which were not mineral at the time of the grant, and also to those which were not reserved, sold, granted, or otherwise appropriated, and were free from preemption and other claims or rights at the time the line of the road was definitely fixed, and was coupled with the condition that all mineral lands were excluded from its operation, and that, in lieu thereof, a like quantity of unoccupied and unappropriated, agricultural lands, in odd sections, nearest to the line of the road, might be selected.

"There is, in our judgment, a fundamental mistake made by the plaintiff in the consideration of the grant. Mineral lands were not conveyed but by the grant itself and the subsequent resolution of Congress cited were specifically reserved to the United States and excepted from the operations of the grant. Therefore, they were not to be located at all, and if in fact located they could not pass under the grant. Mineral lands being absolutely reserved from the inception of the grant, Congress further provided that *at the time of the location* of the road other lands should be excepted, viz: those previously sold, reserved, or to which a homestead or preemption right had attached."

This language leaves no room for doubt as to the effect of the statute when considered independently of the patent.

THE PATENT CANNOT CHANGE THE TITLE GRANTED OR ENLARGE OR DIMINISH THE EXTENT OR AMOUNT OF THE GRANT. ITS OFFICE IS TO AFFORD CONVENIENT EVIDENCE OF THE TITLE GRANTED AND TO IDENTIFY THE LANDS OF WHICH THAT TITLE PASSED BY THE STATUTE.

The legal title to all the lands granted by the act passed thereby upon the filing of the map of definite location, and the Supreme Court has uniformly held that the patent provided for in the statute was not intended to and does not grant or convey anything. In Desert Salt Company v. Tarpey, 142 U. S. 240, which was a case arising under the Central Pacific Railroad grant (13 Stats. 356), replying to the argument that the provisions in the fourth section for the issuance of the patent qualified the grant, *in praesenti,* of the third section, the court says:

> "But it is contended that the natural import of the granting terms of the Act is qualified and restricted by its fourth section, which, as amended by the Act of 1864, provides that, upon the completion of not less than twenty consecutive miles of the road and telegraph line in the manner required, and their acceptance by the President upon the report of the commissioners appointed to examine the work, patents shall be issued to the company conveying the right and title to lands on each side of the road as far as the same is completed.
>
> "The question naturally arises as to the necessity for patents, if the title passed by the Act itself upon the definite location of the road, when the alternate sections granted had become identified. We answer that objection by saying that there are many reasons why the issue of patents would be of great service to the patentees, and by repeating substantially what we said on that subject in Wisconsin Central Railroad Company v. Price Company, 133

> U. S. 406, 510 (33, 686, 694). While not essential to transfer the legal right the patents would be evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved from the possibility of forfeiture for breach of its conditions. They would serve to identify the land as coterminous with the road completed; they would obviate the necessity of any other evidence of the grantee's right to the lands, and they would be evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would thus be in the grantee's hands deeds of a further assurance of his title and, therefore, a source of quiet and peace to him in its possession."

The court used the same language in St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company, 139 U. S. 1. But in Barden v. Northern Pacific, *supra,* the Northern Pacific claimed that the language above quoted meant that upon the definite location of the line of the road, the statute passed title to mineral lands in the odd sections which were not known to be mineral, and in reply to that argument the court says:

> "The cases cited in support of the claim of the plaintiff only show that the identification of the sections granted and of the exceptions therefrom of parcels of land previously disposed of, leaves the title of the remaining section or parts thereof, to attach as of the date of the grant, but has absolutely no other effect. Such is the purport, and the sole purport, of the cases of St. Paul and Pacific Railroad Company v. Northern Pacific Company, 139 U. S. 1, 5, and Desert Salt Company v. Tarpey, 142 U. S. 241, 247, cited by the plaintiff. In both of those cases the writer of this opinion had the honor to write the opinions of this court; and it was never asserted or pretended that they decided anything

whatever respecting the minerals, but only that the title to the lands granted took effect, with certain designated exceptions, as of the date of the grant. They never decided anything else. And what was the title? It was of the lands which at the time of the grant were not reserved as minerals, and of the lands which at the time of the location had not been sold, reserved, or to which a preemption or homestead had not attached."

It is evident from these cases that the grant as made by the statute which passed the legal title at the time of the filing of the map of definite location of the road, of all the lands to which the grant ever attached; that it attached to no mineral lands; that the patent was not intended to and does not (under the provisions of this statute) grant or convey any lands, but is simply evidence of the grant made by the statute, and was never intended to be anything else. Such is not, as we have shown, the purpose or effect of a patent issued under a general statute where the patent is itself the grant which under such statute must be unconditional when made.

LANDS ARE NON-MINERAL WITHIN THE MEANING OF THE STATUTE:

1. IF THEY ARE NON-MINERAL IN FACT.

2. IF THE INTERIOR DEPARTMENT HAS DECIDED THAT THEY ARE NON-MINERAL IN FACT, AND SUCH DECISION IS NOT SHOWN TO BE ERRONEOUS BEFORE THE ISSUANCE OF PATENT REMAINING IN FORCE.

Defendants do not deny subdivision one of this proposition. They admit by their demurrer, that the lands in controversy are mineral in fact. Therefore it must ap-

pear that they are, for some reason, non-mineral within the meaning of the statute, although they are mineral in fact, or title to them never passed under it.

If these mineral lands were at the date of the patent public lands, then an erroneous decision, by the proper officers of the Interior Department, that they were non-mineral and the issuance of the patent provided for in the statute, showing that such decision was made, would, so long as such patent remained in force, establish the character of the land as non-mineral within the meaning of the act, because those officers, acting under the direction of the Secretary of the Interior, constitute a special tribunal having jurisdiction to determine the character of lands granted by Congress and their decisions of questions of fact in such matter are final except in direct proceedings.

The inquiry is then narrowed to this:

Does it appear from the record that the officers of the Interior Department made an erroneous decision before issuing the patent pleaded in this case that all the lands therein described in terms of the records of the land office, were non-mineral?

In answering this question it must be remembered:

1. The condition, *in praesenti* of the grant that the lands must be non-mineral before the grant can attach to them renders a decision by the proper officers that they are such necessarily prerequisite to the attachment of the grant to them; and,

2. The defendants confessedly seek to establish, by virtue of an erroneous decision by public officers, their title to property which Congress intended and declared

that they should not have, and they must therefore show affirmatively from the record that such erroneous decision was made.

A discussion of these two minor propositions leads directly to the consideration which divided the court in the Barden case. When that case came before the court it was irrevocably committed to the following propositions in construction of railroad land grants:

1. That the railroad grants were grants *in praesenti*, and that they passed a present title as of the date of the grant to all the land granted by them, upon the definite location of the line of the road. Such had been the uniform rulings of the Supreme Court in many cases.

2. That a patent issued under the provisions of one of these railroad grants neither granted nor conveyed anything, but was only convenient evidence of the grant made by these special statutes, and that the road opposite the lands had been completed.

The court had also uniformly held that in case of grants made by patents issued under general statutes, the decision by the officers of the Interior Department of all questions of fact necessary to entitle the applicant to the land, was necessarily prerequisite to the making of the grant by the issuance of the patent, and that, therefore, the grant having been made, the patent, which was a perfect record of the grant, precluded any collateral inquiry as to the character of the lands described in it.

The court was confronted with these previous rulings, in considering the exclusion *in praesenti* of all mineral lands from the operations of the granting act, and this

excluding clause of the statute was direct, positive and unqualified. The difficulty was to give effect to this exclusion clause, in accordance with the plain intention of Congress, and not overrule the cases which held that the statute passed a present title, and that the patent in no way changed the grant made by the statute.

The minority of the court sought to reconcile the apparent conflict by conceding that only lands known at the date of the grant to be mineral were excluded therefrom. Their reason for this was that the patent cannot change the grant and that, if lands not known to be mineral, at the time of the grant could be claimed by citizens when they afterwards turned out to be mineral, then the question of the character of the land could never be settled, and the title would always be uncertain.

Mr. Justice Brewer stated tersely, in his dissenting opinion, at page 335 *et seq.*, the difficulty which confronted the court in Barden v. Northern Pacific, *supra,* when he said:

> "But it is said that Congress never meant that this vast mineral wealth should pass to this corporation, and that the individual must contract with that corporation for the purchase of any mine, and yet with a strange inconsistency, as it seems to me, before the opinion is closed it is declared, *in effect,* that Congress meant that when the President should issue a patent, the mineral wealth, vast as it is supposed to be, should then pass to the corporation. If Congress by its legislation excluded mineral lands from the scope of this grant, then surely no executive officer is authorized to convey mineral lands, and even the patent of the President passes no title thereto. The concession *that the patent conveys the mines* as incident to the conveyance of the land is a concession that the lan-

guage of the grant, excluding from the operation of the grant mineral lands, is not to be taken absolutely; and leaves the only difference between the opinion of the court and my own that of the time as to which the identification of the lands as mineral lands is to be had."

The learned justice then cites and quotes from—

St. Paul & Pacific Railroad v. Northern Pacific Railroad, 139 U. S., 1, 5;

Schulenberg v. Harriman, 20 Wall. 44, 60;

Leavenworth, Lawrence etc Railroad Co. v. United States, 92 U. S. 733;

Missouri, Kansas etc. Railway Co. v. Kansas Pacific Railway, 97 U. S. 491;

Railroad Company v. Baldwin, 103 U. S. 426;

Langdreau v. Hanes, 21 Wall. 521;

Wright v. Roseberry, 121 U. S. 488, 497;

Desert Salt Company v. Tarpey, 142 U. S. 241, 247;

Wisconsin Central R. R. Co. v. Price County, 133 U. S. 496, 507;

—to show that the title of all lands granted passes as of date of the grant upon the filing of the map of definite location of the road, and that the patent does not, and could not, pass title to any lands not granted by the statute, but was intended only as evidence of the grant made by the statute.

No one can read the opinions in those cases and doubt that they establish those two points beyond all question, and the prevailing opinion in the Barden case concedes fully that they do establish them. Therefore, the pivotal question in the Barden case was not *when* "the identification of the lands as mineral lands is to be had", as

stated at the top of page 236 in the dissenting opinion; *but it was what is necessary to fix as non-mineral, within the purview of the granting statute, the character of the lands therein described in terms of the records of the land office,* and thus complete the evidence of absolute title in the grantee. For this we must look to the prevailing opinion in the Barden case where the majority of the court undertook to explain and direct how the title to the odd-numbered sections within the limits of these grants can be forever set at rest, in conformity with the previous rulings of that court. Such explanation and direction were absolutely necessary to refute the arguments set forth in the dissenting opinion, and they constitute the very essence of the reason of the ruling of the court in the Barden case, and it is a misconstruction of the opinion to regard them otherwise.

At page 226 of the prevailing opinion in that case, the court begins consideration of the method provided by law for determination of what odd sections were of the character granted by the statute, and first refers to the argument for plaintiffs that if unknown mineral lands were excluded from the grant, the title would always be uncertain, because mineral might be discovered in them, long after they had passed into the hands of the grantees and improvements of great value made upon them. The opinion concedes that it is—

> "of the utmost importance to the prosperity of the country that titles to lands and to mineral in them shall be settled, and not be subject to constant and ever recurring disputes and litigation, to the disturbance of individuals and the annoyance of the public."

It cannot be reasonably contended that what the court declares in pointing out the method by which a matter "of the utmost importance" is to be determined according to law is *obiter,* especially when the designation of such method is necessary to harmonize the ruling of that court with previous opinions.

After stating that the exclusion of all mineral land from the grant *need not create uncertainty in titles,* the court points out that the officers of the Interior Department can investigate and *determine* the character of the lands, and

> "issue to the rightful claimant the patent provided by law specifying that the lands are of a character for which patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, argricultural lands, or mineral lands, and so designate them in the patent which it issues. The Act of Congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, and as the grant excludes mineral lands, in the direction for such patent to issue, the land office can examine into the character of the lands, and designate it in its conveyance."

Such is the method pointed out by the Supreme Court for settling the titles to lands claimed under these railroad grants, viz.: An examination of the land; a determination that they are non-mineral; *a statement in the patent* that they are non-mineral.

To show that it is within the jurisdiction of the Interior Department to do these things, and that their determination of such questions of fact is final and conclusive in collateral proceedings, the court cites and quotes from Smelting Company v. Kemp, 404 U. S.

636, 640, 641; Steel v. Smelting Company, 106 U. S. 447, 450; Heath v. Wallace, 138 U. S. 573, 585; Knight v. Land Association, 142 U. S. 161, 178, and Central Pacific Railroad Company v. Valentine, 11 Land Dec. 338, 246; and there can be no question that these cases establish beyond controversy that the Interior Department has jurisdiction to determine such questions of fact, and that their determination of them whether correct or erroneous, is final and conclusive in collateral proceedings.

Having in mind a patent issued in proper form after a determination of the character of the land, and a statement of its character in the patent, the court says that if the officers of the government whose duty it is to prepare and issue the patent issue it unadvisedly, in the absence of fraud, the consequence of the negligence of the officers must be borne by the Government, but it is entirely clear from the opinion that the court was speaking of a patent which, upon its face, stated the character of the land, and the court distinctly says, at the bottom of page 330, that a patent which does not show upon its face by a statement in the patent itself, that the land is non-mineral, does not comply with the Acts of Congress making grants to railroad companies to aid in the construction of their roads. The language of the court is:

> "The fact remains that under the law the duty of determining the character of the lands granted by Congress and stating it in instruments transferring the title of the Government to the grantees, reposes in the officers of the Land Department. Until such patent is issued, defining the character of the land granted and showing that it is non-mineral, it will not comply with the Act of Congress in which the grant before us was made to plaintiff."

It would be difficult indeed to assemble words which would state more clearly than the court states in this opinion that it was the intention of Congress to exclude all mineral lands from the conveyance of this statute, and that before any particular parcel of land could pass to the grantee, absolutely, there must be a determination by the proper officers that the land was non-mineral, *and that such determination must be stated in the patent.*

If there is any doubt as to the meaning of the language above quoted, it is dispelled by the language of the dissenting opinion at page 340, where Justice Brewer says:

> "Take any particular mile of the road; on either side of the line, as located, there are twenty alternate sections within the place limits. By the rule now laid down, the title to no one of these twenty sections passes to the company because it is not known absolutely which are mineral lands. So far as known, none may be mineral, and yet, as in this case before us, six years after the line of the definite location an expiration develops the fact of minerals, and then it is declared that the titles did not pass. When you simply say, as the court does in this opinion, that out of those twenty sections there shall pass the title to such lands as shall thereafter be found or be determined by the Secretary of the Interior to be non-mineral lands, you say in effect that there is no identification of a single tract. This court has hitherto said that when the line of definite location is fixed, the lands granted were identified. That means, if it means anything that the particular lands which passed by the grant were disclosed. Now it is said that they are not disclosed, and cannot be identified as passing by the grant until it shall be affirmatively proved that they do not contain mines, or the Secretary of the Interior has determined that they are not mineral lands."

Although this language is taken from the dissenting opinion, it is an accurate statement by a member of the court of what the prevailing opinion holds, and a comparison of it with the language of the prevailing opinion establishes beyond all question that the Supreme Court in the Barden case laid down the rule that the condition *in praesenti,* of the statute, that the lands must be non-mineral before the grant can attach to them, *renders a decision by the proper officers that they are such necessarily prerequisite to the attachment of the grant to them.*

It is alleged in the bill and admitted by the demurrer that the land in controversy in this suit is mineral in fact, and this bring us to another proposition.

THE APPELLEES CONFESSEDLY SEEK TO ESTABLISH, BY VIRTUE OF AN ERRONEOUS DECISION BY PUBLIC OFFICERS, THEIR TITLE TO PROPERTY WHICH CONGRESS INTENDED AND SPECIALLY DECLARED BY STATUTE THAT THEY SHOULD NOT HAVE, AND THEY MUST THEREFORE SHOW AFFIRMATIVELY FROM THE RECORD THAT SUCH ERRONEOUS DECISION WAS MADE.

In considering this proposition and the methods by which the making of such erroneous decision might be established, it should be remembered that the officers of the Land Department, acting under the direction of the Secretary of the Interior constitute a special tribunal having exclusive jurisdiction to determine all questions of fact in proceedings affecting the disposition of the public domain. When considered as a tribunal it is inferior in the sense that it is not a court of general juris-

diction having full power to decide conclusively all questions of jurisdiction and all other questions of law arising in the course of its proceedings.

Smelting Co. v. Kemp, 104 U. S. 636-640;
Steel v. Smelting Co., 106 U. S. 447-450;
Barden v. Northern Pac., 154 U. S. 288-327-328.

In Grignons v. Astor, 43 U. S. 319, the court had under direct consideration the nature of inferior and superior tribunals, and the nature and conclusiveness of their judgments. In that case it was necessary for the court in answer to arguments of counsel to examine and state the distinction between inferior courts of limited jurisdiction where the record must show jurisdiction and that it was lawfully exercised, and superior courts of general jurisdiction, wherein the record being silent, it will be presumed that jurisdiction existed and that it was lawfully exercised. The court held in that case that in cases arising in superior courts of general jurisdiction the judgment, unless reversed on appeal, is conclusive both of questions of jurisdiction and of the legality of the judgment. Pages 340-41 the court speaking of the effect of judgments of superior and inferior courts said:

> "The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction and whether they exist or not is wholly immaterial if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree it can be impeached only by fraud in the party who obtains it. 6 Peters 729. A purchaser under it is

not bound to look beyond the decree: if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provision of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law. These principals are settled as to all courts of record which have an original jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction, they are not inferior courts in the technical sense of the term, because an appeal lies from their decision. That applies to 'courts of special and limited jurisdiction which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction'; that of the courts of the United States is limited and special and their proceedings are reversible on error, but are not nullities, which may be entirely disregarded. 3 Peters 205. They have powers to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as civil causes, unless reversed on error or appeal. The true line of distinction between courts whose decision are conclusive if not removed to an Appellate Court, and whose proceedings are nullities if their jurisdiction does not appear on their face, is this: A court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to final judgment, without setting forth in its proceedings the facts and evidence on which it is rendered, whose record is absolute verity not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection beyond the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it; whose decision is not evidence of itself

> to show jurisdiction and its lawful exercise, is of the latter description; *every requisite for either must appear on the face of their proceedings, or they are nullities.*"

It was this principal of law governing the proceedings of special inferior tribunals of limited jurisdiction which Justice Field had in mind when in the Barden case, *supra,* in speaking of what a patent issued under a railroad grant should contain, said:

> "Until such a patent is issued, defining the character of the land granted and showing that it is non-mineral, it will not comply with the act of Congress in which the grant before us was made to plaintiff."

The learned justice had in mind the same principle, when in the same case, at page 331, he said:

> "But a patent issued in proper form, upon a judgment rendered after due examination of the subject by the officers of the Land Department, charged with its preparation and issued, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings estop the Government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

And the learned justice had in mind the same principal, when at page 330 of the same case, he said:

> "The fact remains that under the law the duty of determining the character of the lands granted by Congress, *and stating it in instruments transferring the title of the Government* to the grantees, resposes in the officers of the Land Department."

The officers of the Land Department have no jurisdiction to issue a patent under a railroad land grant

without inserting in such patent a clause which would prevent the passing of title to any mineral land as a result of the patent, unless they have previously decided that all the lands described in the patent are non-mineral. A decision by those officers that the land is non-mineral is necessary to their jurisdiction to issue patent which will convey it. This is shown clearly to be the construction which the court placed upon these special granting statutes in pointing out the method by which the title to lands within the limits of railroad land grants can be set at rest. In the Barden case the court says:

> "The Government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which patent is sought sufficiently explored to justify its declaration *in the patent,* which would be taken as its determination, that no mineral lands exist therein."

It is because the court recognizes that the Land Department, in passing judgment upon questions of fact arising in its proceedings for the disposition of public lands, acts as a special technically inferior tribunal having limited exclusive jurisdiction, that it insists that the facts necessary to the passing of the title under the grant must appear upon the face of the patent itself. The wisdom and reasonableness of this rule will at once appear when we reflect that the findings of fact by the department are final and conclusive, because their jurisdiction to determine questions of fact is exclusive. They cannot, except for fraud, be controverted in any other tribunal having either original or appellate

jurisdiction. If the law did not require the record of the proceedings of such inferior tribunal to show both jurisdiction and its lawful exercise by requiring every fact requisite for either to appear on the face of the proceedings, how could a court ever ascertain whether such inferior tribunal having exclusive jurisdiction to decide questions of fact had misapplied or misconstrued the law under and in accordance with which it claimed to act?

Suppose for instance that in the case at bar the Interior Department had been of the opinion that this granting act did not exclude unknown mineral lands from its operation and should have issued a patent containing no mineral exception clause, and no recitals that the lands described in the patent were within the limits of the grant, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights at the time the line of the road was definitely fixed by the filing of the plat, or that the lands were coterminous to a section of 25 consecutive miles of road constructed, and should include in the patent reserved lands or lands upon which citizens had preemption or homestead claims prior to the definite location of the road, or lands upon which valuable mining claims were being worked, how would it be possible in such cases for the court to determine from the records what decisions were made regarding these matters? The rule obtains that their decisions of such questions of fact are final and conclusive as against another claiming the land, and if the record did not show what they had decided and what they had not decided, it would show no facts upon which any court could apply the law.

It is a well established rule that the erroneous decisions of questions of law by the departments are not binding on courts. Decatur v. Paulding, 14 Pet. 479. And in order to know whether or not the department has decided correctly or incorrectly any question of law arising in its proceedings, a court must know how it decided the questions of fact upon which the question of law arose. If the decision of such questions of fact do not appear upon the record it would be impossible to know how the law was construed or applied, so it has been settled beyond controversy that the records of the proceedings of inferior tribunals must show not only the facts upon which they presume to exercise their jurisdiction, but also the facts which will show whether or not they have decided correctly, the questions of law arising upon these facts.

The appellees are therefore confined to the patent and to the records of the proceedings wherein it was issued to show affirmatively that the department erroneously found that the land was non-mineral, which records show affirmatively that no such decision was ever made.

The defendants claim, and the court below held, that the patent pleaded in this suit is in effect a judgment or decree of the Interior Department acting as a tribunal or court. We are willing to concede this contention because in such cases the act must be considered the decree or judgment either of a court of general jurisdiction or of a court of special limited jurisdiction. If it be considered as a judgment or decree of a court of general jurisdiction, then—

> "If there is error in it, of the most palpable kind, if the court which rendered it have in the exercise

> of jurisdiction disregarded, misconstrued or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchases is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given, but not taken in the time prescribed by law."
>
> Grignon's Lessee v. Astor, 43 U. S. 340.

It is clear under this doctrine that even if the department be regarded as a superior tribunal of general jurisdiction, it having issued a patent which purports not to convey such of the lands therein described as are non-mineral *such patent remaining* and no appeal to the Secretary of the Interior having been taken from it, the patent must be held valid according to its terms and import, which are due to the construction placed upon the statute by the department.

On the other hand if the patent be considered as a judgment or decree of a court of special limited jurisdiction, then every fact necessary to confer jurisdiction and also every fact necessary to show the correctness of the judgment or patent must appear of record in the proceedings wherein the patent was issued, or the patent is a nullity, and not only is there no record that the department decided that this land was non-mineral, but both the patent and the record of the proceedings in which it was issued bear unmistakable evidence that no such decision was ever made. The bill alleges and the demurrer admits that the department never decided that the land was non-mineral, which decision was necessary to the attachments of the grant made by the statute; it was necessary to identify the lands as those of which absolute title passed by the statute, and it not appearing of rec-

ord in the proceedings wherein the patent was issued, the judgment or patent which concluded those proceedings is either a nullity or the exception of mineral lands is effective, because the statute confers no authority for the inclusion of mineral lands in the patent. The patent states upon its face that neither the Act of Congress under which it was issued, nor the patent itself taken in connection with the statute conveys any lands which are in fact mineral; so it makes no difference which horn of the dilemma the defendants take. A simple application of the law to the facts pleaded in the bill and admitted by the demurrer demonstrates that the defendants have no title to the lands in controversy in this suit. In other words, if the patent be considered as a final judgment of a superior tribunal having general jurisdiction it is valid as a whole and cannot be disputed. If considered as a final judgment of a special inferior tribunal of limited jurisdiction, *there appearing in the proceedings no finding that the land was non-mineral,* the tribunal had no authority in law to issue any patent thereof unless it had authority to issue a patent which would not pass title to any of the lands which might thereafter be found to be mineral. Even if the department had no authority to issue a patent containing this mineral exception clause, it is still true, *that it did not issue one which does not contain that clause.*

It should be observed here that both the record of the proceedings wherein the patent was issued and the patent itself recite a previous determination of every other question of fact necessary to enable a court to determine whether the patent issued was lawfully issued, but that neither of them recites a determination of the non-

mineral character of the land, which determination was necessary to enable a court to determine, as a matter of law, whether it was within the power of the department upon facts found to issue a different patent, viz.: one purporting to pass an absolute title to all the land described in the patent.

The defendants cannot be permitted in one breath to claim that the Land Department in issuing the patent, acted in the capacity of a court of general enclusive jurisdiction, and that its patent is therefore conclusive and final, and thus establish the validity of the patent or final decree and then in the next breath to claim that the same department, in the same proceedings acted in the capacity of a special inferior tribunal of limited jurisdiction, and that therefore they can, in this proceedings, impeach the validity of those parts of the patent, or decree, which prevents their title from attaching to mineral land, which both the statute and the patent state never passed to them. The rule governing these matters, is that this patent is valid and effective according to its terms and import or is a nullity. Speaking of the effect of a judgment sale and confirmation on attachment by the Court of Common Pleas of Ohio, which was a superior court of general jurisdiction, the court said, in Voorhees v. the Bank of the U. S., 10 Peter, 473:

> "A judgment or execution irreversible by a superior court cannot be declared a nullity by any authority of law if it has been rendered by a court of competent jurisdiction of the parties the subject matter with authority to use the process it has issued; it must remain the only test of the respective rights of the parties to it, p. 474. * * * The line

which separates error in judgment from the usurpation of power is definite; and is precisely that which denoted the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matter adjudicated or purported to have been so. In the one case it is a record importing absolute verity; in the other, mere waste paper; there can be no middle character assigned to judicial proceedings which are irreversible for error, p. 475."

Again, in Wilcox v. Jackson, 13 Pet. 498, 511, the court, in speaking of the nature and effect of the final decisions of the tribunal, said:

"Before we proceed to inquire whether the land in question falls within the scope of any one of these prohibitions, it is necessary to examine a preliminary objection which was urged at the bar, which, if sustainable would render that inquiry wholly unavailing. It is this—that the Acts of Congress have given to the Registers and Receivers of the land offices the power of deciding upon claims to the right of preemption—that upon these questions they act judicially—that no appeal having been given from their decision, it follows as a consequence that it is conclusive and irreversible. This proposition is true in relation to every tribunal acting judicially whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there is such an appellate power, the judgment is conclusive when it only comes collaterally into question, so long as it is unreversed. But directly the reverse of this is true in relation to the judgment of any court acting beyond the pale of its authority. The principle upon this subject is concisely and accurately stated by this court in the case of Elliott *et al.* v. Peirsol *et al.*, 1 Peters, 340, in these words: 'Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or

> otherwise, its judgment, until reversed is regarded as binding in every other court. But if it act without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void."

Nothing could be clearer from the rulings of the court in these cases than that the patent pleaded in this suit must be held valid and effective however erroneous may have been the construction of the law which induced the officers to issue it, unless it was issued without authority; that is, unless the officers have no jurisdiction or power to issue a patent which would pass title to such of the land as was non-mineral, and would not pass title to such of it as was mineral. It is clear from the patent itself that such is its import and, if the officers had no authority to make or issue such a patent, it is clearly a nullity; under these decisions there is no middle ground.

The Land Department acts as a special tribunal in matters pertaining to the disposition of the public lands. Its jurisdiction to determine questions of fact in those proceedings is exclusive and its findings of fact made therein are therefore final and conclusive and binding upon the courts of the country: *Barden v. Northern Pacific Ry. Co.*, 154 *U. S.* 288; but while its findings on questions of law are entitled to great respect by the courts they are not binding upon them, if for no other reason because the Interior Department is a branch of the Executive Department of the Government, and therefore cannot in construing statutes exercise judicial powers to an extent which will deprive the courts of power to declare its construction of laws erroneous whenever it is erroneous. There is no law by which an appeal may

be taken from the decision of a question of law by the head of the Interior Department to any court which is a part of the judicial branch of our system of government. The cases wherein courts have held erroneous, in collateral proceedings, the construction of laws and their application to facts found by the executive department are too numerous to require citation of authorities to show the existence of the power, which is derived directly from the very nature of our system of government under the fundamental principles of which every person has a right to his day in court, and need not be dependent for his rights upon an executive officer's notions of what the law is. Ours is a government of law, and not of men.

Now, in the case at bar, the Interior Department has construed the granting statute and the joint resolution to make it their duty to issue to the railroad company patents for the lands answering the record description set forth in the grant "expressly saving and reserving," "all mineral lands," by making the patent express that the United States had granted (by the statute) and did grant (by the patent) such of the lands described in the patent as are non-mineral, and did not, either by the statute or the patent, grant such of them as are mineral. Such is plainly the meaning of the language of the patent. Whether it is effective to pass title to the grantee of these mineral lands raises the following questions of law:

"Did the facts found by the department before the patent was issued, warrant the issuance of the patent issued? Or, did those facts warrant the issuance of a patent stating that the granting statute and the patent

passed an unqualified title to the grantee of all the lands described in the patent:

"(A) If the department had made no decision as to the mineral or non-mineral character of any of the lands described in the patent.

"(B) If the department had decided that all of the lands described in the patent were non-mineral.

"(C) If the department had decided that all of the lands described in the patent were mineral, but were not known at the date of the grant, to be mineral.

"(D) If the department had decided, or had reason to believe that some of the lands described in the patent were mineral, and that some of them were non-mineral."

The court may have no difficulty in answering correctly any and all of these hypothetical questions, but that is not the point. The point is, that the court cannot tell whether the officers of the executive department answered any or all of these questions of law correctly without first determining accurately what, if anything, the department had previously determined regarding the mineral or non-mineral character of each and every parcel of land described in the patent. The court cannot, therefore, determine whether the executive officers construed and applied the law correctly or erroneously or acted within or transcended the powers conferred upon them by law, unless the records of the departmental proceedings wherein the patent was issued show affirmatively what questions of fact were decided, and what the decisions of them were.

THE PATENT ISSUED CREATES NO PRESUMPTION THAT THE LANDS THEREIN DESCRIBED ARE NON-MINERAL, NOR IS IT AN ADJUDICATION THAT THEY ARE NON-MINERAL.

The defendants attempt to avoid this difficulty by contending that the issuance of the patent creates a conclusive presumption of law, that the department adjudged all the lands described in the patent to be non-mineral before issuing the patent, because such an adjudication was a necessary prerequisite to the lawful issuance thereof, and the court below allowed that contention, and held that, therefore, the mineral exception clause in the patent was inserted without authority of law and was inoperative, void and of no effect to save and reserve to the United States any mineral lands described in the patent.

Let us see to what absurdities this doctrine will lead. It is based upon the argument that neither the record of the proceedings wherein the patent was issued, nor the patent itself shows affirmatively, that the land was adjudged mineral, or that it was adjudged non-mineral, and that therefore, it must be conclusively presumed:

1. That the officers would not have included the lands in controversy in this suit in the patent if they had known that they were mineral; and,

2. That if they did not know that these lands were mineral, it must be conclusively presumed, that they decided that they were non-mineral.

This doctrine and the ruling which allowed it, if permitted to stand, would inevitably confer upon officers of the executive department of the Government, sitting as a special inferior tribunal with limited jurisdiction, all

of the powers of courts of both general and final appellate jurisdiction on all questions of law arising in the course of their proceedings, provided only that such special tribunal, unlawfully nelect and refuse to set forth, in the records or their proceedings, the facts upon which it acted. In reply to any complaint of their erroneous construction, or even wicked disregard of the law, it would be sufficient answer to say:

"The record does not show the findings of fact upon which they decided the questions of law which are claimed to be erroneous; it cannot be determined that the decision was erroneous, or that it was correct; the departmental decision of the questions of fact upon which the law was applied, is final, whatever it was; it must be conclusively presumed that the construction and application of the law, whatever they were, to those facts, were correct; there is no provision of law whereby an appeal on any question of law may be taken to any court which is part of our judicial system. There is no record upon which an appeal may be taken, or which will enable any court, in any separate proceedings, to determine, whether or not, the department misconstrued, or misapplied the law."

Thus would the executive department of the Government be able to usurp and exclusively exercise judicial function in construing laws, contrary to the constitution and laws as construed by the courts. The only condition precedent to usurpation of this power, would be that the executive officers disobey the law and not keep records of their proceedings while the fact that the law provides that they shall keep such records, and that the fact that they do keep them, (because being a special inferior tribunal of limited jurisdiction, the making of complete records is necessary to the validity of their final judgments), raise the conclusive presumption that,

if they had decided that the land was non-mineral, there would be a record of that decision, and that if no such record exists, no such decision was ever made.

If the contention of the defendants and the ruling of the court, in accordance therewith, be permitted to stand, the fact, established by presumption, that this special inferior tribunal, has disregarded the law in that it made no record of its decision of a question of fact, the making of which was necessary to enable the courts to determine whether its construction of the law was correct or erroneous, becomes the basis of another conclusive presumption that the same tribunal, in the same proceedings, construed and applied the law correctly. Then, as if further to demonstrate the inconsistency of these presumptions, the appellee's claim that this same tribunal, in the same proceedings, erroneously decided that the land was non-mineral, and erroneously construed the law to authorize them to insert in the patent a clause designed and intended to save and reserve to the United States mineral lands it had previously decided did not exist.

All of these inconsistent and contradictory results which would necessarily follow from this alleged conclusive presumption, which defendants seek to invoke, are due to an erroneous assumption that decisions of questions of law by this special, technically inferior tribunal, composed of officers of the executive department, which had only a limited jurisdiction, and which forms no part of the judicial branch of our system of government, and from which there is no appeal to any court which does form a part of the judicial branch of that system, are final and conclusive, while the law is

that its decision of questions of fact are final and conclusive, except in cases of fraud, but that its decisions of questions of law are not final, because it has no final or exclusive jurisdiction to decide questions of law, and no appeal lies from it to any court to correct its errors in law.

All these difficulties disappear with the application of the rule of law that the executive officers of the government acting as a special tribunal—inferior in the technical sense—must state in the record of their proceedings wherein the patent was issued, and in the patent itself, the fact of its decision as to the mineral or non-mineral character of the land, in order that the courts may be enabled to determine whether, under the facts found by the department (which findings of fact are final and conclusive in collateral proceedings), there was any authority of law for the issuance of the patent issued, and also whether it had authority upon facts decided to issue some other and different patent which it did not issue. Every finding of fact necessary to show authority of law for the issuance of the patent issued, must appear on the face of the records of the proceedings, or they are nullities. Therefore, if the record does not show affirmatively that the department decided that all of the lands described in the patent were mineral, or that they were non-mineral, it certainly cannot, on the theory that this inferior tribunal must be conclusively presumed to decide correctly the question of the character of the land, which is admitted to be mineral, be conclusively presumed, that they decided erroneously that they are non-mineral.

A decision that the land was non-mineral could not be a necessary pre-requisite to the issuance of the patent issued, which purports not to pass title to such of the lands as are mineral; therefore *the patent issued* can raise no presumption that such decision was made. The existence of a patent purporting to pass an absolute title to all the lands described in it might raise such a presumption, but no such patent exists in this case and therefore no such presumption rises or exists.

He who alleges an erroneous decision by any tribunal must show it, and in this case, because of the nature of tribunal which issued the patent and its limited powers, such decesion must be shown, if at all from the record of the proceedings wherein the error is alleged to have been committed.

It must not be forgotten that presumptions and especially conclusive presumptions of law are indulged by courts to uphold the final acts of public officials and therefore necessarily arise from the *nature and import of the final act done.* The nature and import of the final act determines what must be presumed and the presumption never determines the nature or import of the final act.

A presumption is nothing more or less than a logical inference deducible from facts and circumstances known. It is inconsistent with reason to say that such inference which owes its existence to facts established can change those facts, or create by way of another inference the facts from which it arises.

This very case affords a fine illustration of the fallacy of the appellee's contention that the patent issued

creates a conclusive presumption that all the lands therein described are non-mineral, or, in another form—that the issuance of the patent was a complete adjudication that all the land described in it is non-mineral. The patent purports to pass title of such of the lands therein described as are non-mineral and not to pass title to such of them as are mineral. By what process of logic or reason can it be inferred that the officers who prepared such a patent had previously decided that all the lands described in it were non-mineral? Is it reasonable or logical to *presume* that they meant to exclude from the effect of the patent mineral lands which they had decided did not exist? The fact that they undertook to exclude mineral lands from the effect of the patent is not only evidence but is proof that they were satisfied that some of the lands described in the patent were mineral. The fallacy of the appellees' argument on this point is apparent in this: They assume that the officers who issued the patent had no authority in law to issue the patent which they did issue, and that they ought to have issued another and different kind of patent, viz.: One purporting to pass an absolute title to all the lands described in the patent issued. Then from such patent, which they claim ought to have been, but was not issued, they deduce their alleged conclusive presumption and then apply it to another kind of patent actually issued for the purpose of changing by a species of legal fiction the patent issued in such manner that it will read as they want it to read.

The difficulty is that no patent which could give rise to the alleged presumption was ever made or issued for

the lands in controversy and therefor no such presumption concerning these lands ever existed.

The validity of the patent issued does not require a previous decision by the officers that the land is not mineral. Therefore it raises no presumption that such decision was made. It is true that if such decision was made the officers would have had no authority or reason for expressly excluding mineral lands from the effect of the patent, because such decision would render them non-mineral within the meaning of the statute after the issuance of the patent upon such decision, regardless of whether they contained mineral or not, and no one could question the correctness of that decision except in a direct proceeding to annul or cancel the patent.

THE OFFICERS OF THE INTERIOR DEPARTMENT HAD AUTHORITY IN LAW TO ISSUE THE PATENT PLEADED IN THIS CAUSE, WHICH PURPORTS TO PASS TO THE RAILROAD COMPANY SUCH OF THE LANDS THEREIN DESCRIBED AS ARE NON-MINERAL AND NOT TO PASS TITLE TO IT OF SUCH OF THEM AS ARE MINERAL.

We do not contend that if it be once established that the department decided that all the lands described in the patent are non-mineral, we have a right to show that such decision was erroneous, but we do contend:

1. That neither the patent nor the record of the proceedings where in it was issued shows that such decision was made, and that it can be shown from no other source.

2. That both the record and the patent shows affirmatively that such decision was not made.

3. That such decision cannot be presumed to have been made because the record leaves no room for such presumption.

The bill alleges and the demurrer admits that at the time the patent issued there was no law, state or federal, or any custom or usage of miners in force in the mining district where the lands were located requiring or allowing notice of mining locations to be filed in either the local land office or the General Land Office before application for patent. [R. 100.] The decision of the officers as to the mineral or non-mineral character of the land was expressly limited to the statement that no mining claims appeared of record or on file in those offices. [R. 125.] The laws then in force required or allowed the filing and recording of notices of mining locations in the office of the recorder of the mining district or the recorder of the county wherein the claims were located. It could not be assumed that patent had been applied for on every claim located prior to the issuance of the patent to the railroad company, nor can it be assumed that it was the intention of Congress or of the department to divest by the patent, all the rights of mineral locators who had not applied for patent prior to the issuance of the railroad company's patent. This is plainly shown by the exclusion of all mineral lands made in both the patent and the act under which it was issued.

Cowell v. Lammers, 21 Fed. 200, is a case upon which appellees rely to establish the invalidity of the mineral exception clause contained in the patent. In that case the patent was issued under a railroad land

grant which provided, "That all mineral lands shall be excepted from the operation of this act" and the patent contained the clause "Yet excluding and excepting all mineral lands should any such be found to exist in the contracts described in the foregoing."

Judge Sawyer, who wrote the opinion in this case and in *Francocur v. Newhouse, infra,* was committed to the proposition that the granting statute excepted from its operations only lands known at the time of the grant to be non-mineral. It appears from the recital of facts in that case that the land was in the actual possession of another who had purchased it from the railroad company, and prior to the patenting of it to the railroad company the land had been worked as a placer mining claim and had been abandoned because it did not pay, and that at the time the patent was issued the land was considered of no value as mineral land. Judge Sawyer held that a mineral locator could initiate no right upon the land where it was in the actual possession of another under color of title. It is true that he also held that there was no authority in the statute for the insertion of a clause in the patent excluding mineral land from the conveyance. As a reason for this he states that the records and notes of the survey and the evidence upon which the character of the land must be determined *prima facia.* This holding, of course, was overruled in the Barden case, where it is distinctly held that the law does not contemplate the ascertainment of the mineral or non-mineral character of the land from the field notes of the survey, but that the information furnished by those notes is gathered incidently for the use of the Interior Department. He also holds that such an

exception could in no case apply to mineral lands which were not at the date of the patent known to be mineral.

Francoeur v. Newhouse, 40 Fed. 318, upon which defendants also rely further explains the position of Judge Sawyer and his consideration of the statute in Cowels v. Lammers. In Cowels v. Lammers, he held, among other things, that the exception in the patent only applied to lands known at the date of the patent to be mineral, and as the word "known" was not in the patent; to be consistent he saw that he must hold in Francoeur v. Newhouse that the statute, which did not contain the word "known" in connection with the exclusion of mineral lands, must also be construed to mean lands known at the date of the grant to be mineral, if the decision in Cowels v. Lammers was correct.

Judge Sawyer was certainly consistent in the position which he took, but it is not consistent to say that the language of the granting act, "all mineral lands", means all mineral lands known or unknown, and that the same language in the patent means all known mineral lands, but does not mean unknown mineral lands. There is no reason for construing this language as meaning one thing when used in the patent and meaning something else when used in the statute. Therefore, we say that the exclusion clause contained in the patent was interpreted by the Supreme Court in the Barden case when it interpreted the clause excluding all mineral lands from the operations of the statute, it is said that all mineral lands mean *all mineral lands*, and does not mean all *known* mineral lands.

Judge Sawyer was of the opinion that only lands

known to be mineral at the date of the grant were excluded from the operation thereof, and this opinion was the basis of his decision both in the case of Cowell v. Lammers and Francoeur v. Newhouse. Both of these cases were decided before the opinion in Barden v. Northern Pacific, 154 U. S. 288, was written and when the Supreme Court held in that case that the words "All mineral lands" mean all mineral lands whether known or unknown, and that they do not mean "All known mineral lands," all the reasoning of Judge Sawyer was of no avail. It is not too much to say that the Barden case deprives both the cases of Cowell v. Lammers and Francoeur v. Newhouse of all their force as authorities because the Barden case also holds that the officers of the Interior Department may lawfully insert in the patent a clause excepting mineral land if they have not made sufficient examination of the land described in the patent to justify their statement in the patent that all the land therein described is non-mineral.

Shaw v. Kellogg, 170 U. S. 312, is another case upon which appellees relied to sustain their contention in the case at bar, and it does not, for the reason that in that case there was a decision of the proper officers after an examination and determination that the land was non-mineral in fact. The grant was of a privilege to the heirs of one Baca, who claimed the land upon which Los Vegas in New Mexico is located, to select in lieu thereof "an equal quality of vacant land, non-mineral, in the territory of New Mexico" and the Act of Congress made it "the duty of the surveyor general of New Mexico to

make survey and location of the land so selected" upon application to him by the beneficiaries of the grant.

Instructions were sent to the surveyor general by the General Land Office to the effect that his certificate of the survey and location to the General Land Office "must be accompanied by a statement from the register and receiver that the land is vacant and not mineral." Application was made by the beneficiaries of the grant for a survey. The surveyor general of Colorado in whose jurisdiction the territory wherein the selection was made had been included, wrote the General Land Office, "I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca floats, and he intended to locate it as this is located, for the reason that, in his opinion, it would cover rich minerals in the mountains."

In reply the General Land Office informed him also, directly, that his certificate of the survey and location "must be accompanied by the certificates of the surveyor general and the register and receiver, that the land selected is vacant and non-mineral," and added:

> "Especially should the character of the locations as to minerals be carefully ascertained after the important statement of Ex-Governor Gilpin which you communicated in your official letter to this office. When you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable you to do so, you will transmit to this office your official certificate setting forth these facts.
>
> "You will also correspond with the register and receiver of Colorado, when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the

same conditions that your own is to be furnished under, which, when received, you will forward to this office."

Survey of the land was made under contract with one Sheldon which was disapproved and the surveyor general was again told that the certificate of the survey and location must be accompanied by the certificates of the surveyor general and the register and receiver, that the land is vacant and not mineral.

Thereafter the surveyor general sent to the General Land Office the following certificates as to the character of the land:

"Denver, C. T., Dec. 15, 1863.

Sir:—

This is to certify that from good and sufficient evidence, I am perfectly satisfied that the land on which the heirs of Luis Marie Baca have located their grant No. 4 in the San Luis Valley, and marked out by the survey made by Albinius Z. Sheldon in November, 1863, is not mineral and is vacant.

Very truly your obedient servant,

JOHN PIERCE,

Surveyor General of Colo. & Utah."

"Colo. Ty. Golden City, Dec. 5, 1863.

Sir:

This is to certify that from good and sufficient evidence, we are perfectly satisfied that the land on which the heirs of Luis Marie Baca have located their grant No. 4 in the San Luis Valley, and marked out by the survey made by Albinius Z. Sheldon, in November, 1863, is not mineral and is vacant.

G. N. CHILCOTT,

Register Land Office Colo. District.

C. B. CLEMENTS,

Receiver Land Office Colo. Ty."

To this the General Land Office replied:

> "Evidence furnished by you is not sufficient in the opinion of this office to prove that the selection of No. 4 does not cover valuable mineral deposits. Your certificate is not based upon actual knowledge of the facts, but upon information and conclusions deduced from reason. This kind of proof is not deemed sufficient when large public interests may be involved, and the character of the location is made still more doubtful by the statement of Ex-Governor Gilpin officially communicated to this office by Surveyor General Case, that there are mineral lands in that locality."

On Feb. 12, 1864, the General Land Office again wrote to the surveyor general in part as follows:

> "The difficulty, however, may be avoided by pursuing the following course: The general field notes duly verified and authenticated, must be filed in the surveyor general's office of Colo.; upon bringing these to the usual satisfactory tests and finding the same all regular and correct, you are authorized in virtue of the aforesaid sixth section of said Act of June 21, 1860, to approve the said survey, but in your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land nor to interfere with any other vested rights if such exist."

This was plainly an adoption of the survey made by Sheldon as the survey of the surveyor general after satisfactory tests and examination of that survey by him, and after the determination by him that the survey was correct. The field notes of this survey, given on pages 322 and 323, set forth a very careful statement as to the character of this land and concludes with this statement:

> "Saw no indications of the precious metals or other minerals of any kind, unless the presence of

> iron may be inferred from the fluctuations of the needle set forth in the notes."

The map of the survey was also filed and approved by the surveyor general.

On January 14, 1868, application for patent was made and refused on the ground that the statute did not authorize the issuance of the patent, and in denying the application the commissioner of the General Land Office called attention to the fact that before locating the land "the surveyor general had expressly found and certified that this land was not mineral" and the construction placed upon that act by the Interior Department is set forth by the commissioner in his letter as follows:

> "The condition and provisions of the Act of June 21, 1860, were as respects this question, that the selection and location should be on land determined at the time of such location when the title passed to be non-mineral land."

It will be noted that there was in this granting act no provisions excepting mineral lands from the *operations* of the act. The land was not granted *in praesenti* by the statute. No title could pass under the statute until the determination and decision was made by the proper officers that the land was non-mineral, and that when such decision was made the title passed and that the decision that it was non-mineral was made by the proper officers, and the records of the proceedings for the *passing of the title by the officers of the department, showed that the necessary decision as to the character of the land was made.* This case is clearly an authority for the proposition that whenever a grant of public lands, of any particular character is made, either by the statute

or by a patent, there must be a determination by the proper officers that the land is of the character granted and that such determination must appear as a part of the records of the proceedings of the officers of the Interior Department, whose duty it is to carry the grant into effect. That the court considered such finding and record necessary to the passing of the title, is evidenced in this opinion by a quotation from the case of Deffenback v. Hawke, 115 U. S. 392, 404, as follows: "The land officers who are merely agents of the law, had no authority to insert in the patent any other terms than those of the conveyance *with recitals showing compliance with the law and the conditions which it prescribes*" (italics ours), and also by the court's consideration of the decision made in the Barden case. Speaking of that case at page 339, Justice Brewer, who dissented in the Barden case, uses the following language: "It is true there was a division of opinion, but that division was only as to the time at which *and the means by which the non-mineral character of the land was settled.*" (Italics ours.) That an examination and determination of the character of the land and the statement of that determination in the patent were the *means* by which the character of the land should be settled, is further evidenced by other quotations from the Barden case in Shaw v. Kellogg, as follows: "It can hear evidence upon and determine the character of lands to which the parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimants the patent provided by law, *specifying that the lands are of the character for which patent is authorized*" (italics our own); and again, "the fact remains that under the

law the duty of determining the character of the lands granted by Congress *and stating it in instruments transferring the title* of the Government to the grantees, reposes in officers of the Land Department." (Italics ours.)

The grants under the statute considered in Shaw v. Kellogg was completed by the selection, the survey and location of the land and the finding by the proper officers that the land was non-mineral. The evidence of the title was the records of these proceedings. No one will contend that if the records of those proceedings did not show affirmatively a determination that the land was non-mineral, the title could have passed.

The views of the court below as to the effect of the saving clause in the patent are tersely stated in the opinion as follows:

> "There is absolutely nothing in the saving clause of the joint resolution either requiring or authorizing the patent thereby directed to be issued for the granted lands to contain those conditions or restrictions or any of them. If such patents were thereby required or authorized to contain one of the conditions or restrictions, then manifestly they were required to contain all of them, for no distinction is made between them by Congress and none can be found in the language of its acts in question. Clearly, therefore, if the contention of the complainant's counsel is correct that by the joint resolution of June 28th, 1870, Congress required that the patents to be issued to the railroad company for lands within the grant made to it should contain an exception of all mineral lands, they were likewise required to contain a similar exception of all lands reserved, sold, granted or otherwise appropriated, and all lands to which the United States did not have full title, and which were not free from preemption or other claims or rights at the time the

> line of the grantee's road was designated by the plat thereof, filed in the office of the commissioner of the General Land Office. There is no escape from this conclusion, for I repeat that the statute makes no distinction between the conditions and restrictions of the grant, save only the rights of actual settlers therein expressly specified, and no distinction in the other conditions and restrictions of this grant has been or can be suggested by counsel for the simple reason that the statute contains none."

In the first place there is a manifest difference between authorizing and requiring these conditions and restrictions to be saved and reserved in the issuing of the patent, and authorizing and requiring them to be saved and reversed by any particular means or method in the issuing of the patent.

The inherent powers of the executive department are ample authority under these acts for the issuance of the patent issued thereunder. Neither the act or the joint resolution directs the Secretary of the Interior or any other government official to save and reserve the restrictions of the grant to mineral lands by determining prior to the issuance of the patent what of the odd numbered sections within the limits of the grant are mineral and what are non-mineral, and to include in the patent only non-mineral lands; nor does either the act or the joint resolution specify any other method or means by which these restrictions and conditions are to be saved or reserved in the issuing of the patent; but they clearly make it the duty of the Secretary of the Interior "to cause patents to be issued to said company for the sections of land coterminous to each constructed section of land reported on as aforesaid to the extent and amount

granted to said company by the said act of July 27, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

This language is a clear direction to the Secretary of the Interior to cause to be issued patents expressly saving and reserving the specific conditions and restrictions contained in the third section of said act; and under it the patent must express, *in some way,* the saving and reserving of all these conditions and restrictions which are, in respect to the means by which one could determine to what lands they apply, of two classes:

1. The records of the land office required by law to be kept would reveal of what of the lands the United States had full title, and what of the lands were not reserved, sold, granted or otherwise appropriated, and what of the lands were free from pre-emption or other claims or rights at the time the line of the road was definitely fixed.

2. The records of the land office would not show what of the lands within the limits of the grant were mineral and what were non-mineral, for the simple reason that there had been no record of all mineral lands made, nor was there any provision of law for the making of such a record, and the mineral or non-mineral character of the land within the limits of the grant could be determined only after extensive exploration and examination of all of the lands.

The officers of the Interior Department expressed, in the patent, the savings of the restrictions and conditions of the former class by examining the records of the land office and including in the description of the patent only

lands to which these conditions and restrictions did not apply, and also by distinct recitals in the patent that none of the lands therein described were subject to claims or rights which brought them within any conditions or restrictions of the former class.

The officers could not determine from the records of the land office what of the lands were non-mineral; they made no examination of the land themselves with a view to determining their mineral or non-mineral character, but sought to save and reserve the limitation and restriction of the grant to non-mineral lands by issuing a patent which would pass title to such of the lands as were non-mineral and would not pass title to such of them as were mineral.

The means by which, and the manner in which those officers should have saved and reserved these conditions and restrictions of the grant were, in the absence of specific directions prescribed by law, matters entirely within their discretion, and it is not necessary for them to show affirmative statutory authority for everything they do in the discharge of their duties, much less for the means by which they accomplish the results required by the acts of Congress. This was settled as early as 1833 in United States v. Macdaniel, 7 Pet. 1.

McDaniel had been a clerk in the Navy Department at a salary of $1400 per year for 15 years, and had also acted as agent of the government in paying pensions and had been allowing commissions on his pension disbursements as such agent. Under a new construction of the statute by the department he was not entitled to these commissions and the United States sued him to recover $988.96 which he did not owe if these commissions were

allowed to him. The Supreme Court held that the custom or usage which had obtained in the department under the former construction of the statute was binding as to past transactions and that McDaniel was entitled to the commissions and that the United States could not recover them from him. In that case the court said:

> "A practical knowledge of the action of one of the great departments of the government must convince every person that the head of the department, in the distribution of duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his power by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of the government would evince a most unpardonable ignorance of the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined and which are essential to the proper action of the government; hence, of necessity, usages have been established in every department of the government which have become a kind of common law and regulate the rights and duties of those who act within their respective limits, and no changes of such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction of it, and must be considered binding on past transactions."

The cross bill alleges [R. 123] and the demurrer admits that for the forty years immediately preceding the issuance of this patent it had been the uniform custom of the Interior Department to issue, under all railroad land grants, patents containing the mineral exception

clause found in this patent, which was issued in conformity to that custom. This custom arose and obtained during all that time under the same construction of these grants by many successive secretaries of the interior and none of them doubted that these patents were effective to save the mineral land therein described to the Untted States. Hundreds of thousands of acres of the most valuable mineral lands in the western states have been included in the descriptions of such patents issued under these grants to railroad companies which have accepted them, without protest, and with full knowledge of their nature and import, and with full knowledge of the fact that the reason why the patent purports to except mineral lands is that there had been no prior examination and determination of the character of the land, and that the government officials relied upon the import of the patent prepared and issued under this construction of the statute to save mineral lands to the United States.

Now, the question is, whether the action of the department in undertaking to save and reserve the limitation of the grant to non-mineral lands, by incorporating in the patent a saving clause, shall be binding and effective as to past transactions to keep the grant limited to non-mineral lands, or whether that clause which, if effective, will accomplish the intention of Congress, shall be adjudged void and the rest of the patent valid, and the will and intention of Congress expressed in the statute and patent be defeated and hundreds of millions of dollars worth of mineral land, which Congress has said should not pass by operation of this grant, be turned over

under it to this corporation, contrary to the express provisions of its grant.

It must be remembered that if the government officers had no authority to issue the patent which they did issue, yet the fact remains that *they issued none other.*

No injury can result to the railroad company from an adjudication that the patent is effective to save and reserve mineral lands to the government, for it would deprive the railroad company of nothing which was granted, while if it is not held effective, the railroad company will acquire title to lands which it is by law prohibited to acquire under the grant.

THE GREAT WEIGHT OF AUTHORITY IS TO THE EFFECT THAT THE SAVING CLAUSE IN THE PATENT IS EFFECTIVE AND LIMITS THE TITLE OF THE RAILROAD COMPANY TO LANDS NON-MINERAL IN FACT.

McLaughlin v. Powell, 50 Cal. 64.

In this case plaintiff held by mesne conveyance from the railroad company, which claimed to have acquired title by a patent dated May 31, 1870, issued to it under the railroad land grant of July 1, 1862, and July 2, 1864. The patent contained the clause:

"Yet excluding and excepting from the transfer by these presents 'all mineral lands' should any be found to exist in the tracts described in the foregoing."

The defendant offered to prove that the land was mineral land, that he had held it as a mining claim since October, 1866. The trial court excluded this evidence and the plaintiff recovered. The Supreme Court reversed the case for the exclusion of this evidence and said:

"The exception contained in the patent is part of the description and is equivalent to an exception of all of the subdivisions of land mentioned, which are 'mineral lands,' in other words, the patent grants all of the tracts named in it which are not mineral lands. If all are mineral lands, it may be that the exception is void; but the fact cannot be assumed, as by its terms the exception is limited to such as are mineral lands and does not necessarily extend to all the tracts granted.

"We think the defendant should have been allowed to prove that the demanded premises were mineral lands. Judgment reversed."

Chicago Quartz Mining Co. v. Oliver, 75 Cal. 194.

The land was claimed by mesne conveyance from the railroad company who clamed to have acquired title by patent issued to it under the railroad land grant of July 1, 1862, and July 2, 1864. The defendant claimed under the mining patent dated August 16, 1883, the court below found that the land in dispute had been known and worked as mineral land since 1861. The patent to the railroad company contained the following clause:

"Yet excluding and excepting from the transfer by these presents 'all mineral lands' should any be found in the tracts described in the foregoing."

The court held that the mining patent of 1883 was valid and that the land did not pass to the railroad company under its patent issued under the railroad land grant.

Gale v. Best, 78 Cal. 235.

The plaintiff sued and recovered land from the defendant. Plaintiff held it by mesne conveyance from a railroad company under a grant by Congress. The

granting act excluding all mineral lands. The patent issued under that grant *contains no clause excepting or excluding mineral lands from the operations of the patent.* The defendant in 1885 located the land as mineral and began mining operations thereon; the court held that as there was no reservation or exception of mineral lands in the patent, the patent raised a conclusive presumption, against collateral attack, that the land was non-mineral, and the plaintiff recovered. In this case the court affirmed the doctrine of McLaughlin v. Powell, *supra*, and Chicago Quartz Mining Company v. Oliver, *supra*, and said that those cases differed from the one then at bar *because in those cases the patent excepted "all mineral land" should any such be found therein.*

In Van Ness v. Rooney, Vol. 41 Cal. Dec. 695, the Supreme Court of the state of California reaffirmed the doctrine of McLaughlin v. Powell and Chicago Quartz Mining Company v. Oliver, and held the mineral exception clause in the patent valid. That the Federal statute of March 2, 1896, was not applicable to a patent containing such mineral exception clause, and that such patent does not create a conclusive presumption that the lands therein described are non-mineral, and that the mineral exception clause is a part of the description of the land mentioned in the patent.

In Eastern Oregon Land Company v. Willow River Land and Irrigation Company, an opinion by Judge Bean filed November 10th, 1910, held that the railroad land grant patent containing the clause "yet excluding and excepting all mineral land should any such be found in the tracts aforesaid," "manifests an intention on the part of the government not to convey mineral lands and

repels any inference that the department adjudicated or intended to adjudicate that no part of the land described in the patent was mineral."

Here is an unbroken line of authorities entitled to great respect by this court to the effect that the mineral exception clause contained in the patent here pleaded is valid and effective and prevents mineral lands from passing either by the granting act or the patent.

THE DISCUSSION OF THE JOINT RESOLUTIONS IN THE SENATE DOES NOT SHOW THAT THE SAVING CLAUSE THEREOF WAS INTENDED ONLY TO PROTECT ACTUAL SETTLERS.

The court below was of the opinion that the discussion in the senate of the joint resolution, at the time it was passed by that body, shows that the clause in the joint resolution:—"expressly saving and reserving all the rights of actual settlers together with the other conditions and restrictions provided in the third section of said act"—was solely for the purpose of protecting actual settlers upon the lands along the line of the road, and that the resolution furnished no authority for the issuance of a patent containing a mineral exception clause.

This discussion is found in the Congressional Globe, part 5, second section, 41st Congress, 1869-70, May 31st, 1870, pp. 3350-51-52-53. Practically all that was said in the discussion was said by Senator Casserly of California. He desired to have the senate adopt in place of the language of the resolution last above quoted, the following language as a part of the resolution:

"And provided, that all persons who before the passage of this joint resolution shall have located themselves as actual settlers upon any portion of the lands affected by this joint resolution, or by the said act of July 27, 1866, or included in the lands withdrawn by order of the Secretary of the Interior of March 18, 1867, or at any other time, for or on account of said Southern Pacific Railroad Company, whether such persons shall have so located themselves before or after such withdrawal, shall have the right to enter, under the homestead or pre-emption laws of the United States, the lands upon which they have so located themselves in the quantities allowed by said laws, and upon the terms provided thereby."

It will be noted that this amendment which Mr. Casserly desired substituted for the amendment which was adopted, says absolutely nothing about saving anything but the rights of actual settlers, while the amendment which was adopted, viz.—"Expressly saving and reserving of the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act"—includes all the conditions and restrictions of the third section of the Act of July 27, 1866. The court evidently became confused on this point, for certainly what was said by Mr. Casserly in the senate at the time the joint resolution was passed furnishes no aid in the construction of the resolution as it was passed. The amendment which Mr. Casserly desired was rejected, which was a rejection of his argument.

Moreover, it will be noticed that the joint resolution of June 28th, 1870, says that the company may construct its road *as near as may be* on the route designated by the map filed by said company in the Interior Department on the 3rd of January, 1867. The route indicated by that map has always been considered as the general

route, and the map, as the map of general location and not of definite location; therefore, the rights of actual settlers upon the land were fully protected under the Act of July 27th, 1866, for the simple reason that the railroad company could acquire no right to any land along the line of the road until the map of *definite* location was filed, and it had not been filed at the time the joint resolution was passed.

Southern Pacific Company v. Rahall, 3 L. D. 321.

It is therefore clear that the clause in the joint resolution requiring the saving in the patent of the conditions and restrictions contained in the 3rd section of the Act of June 27th, 1866, was for some special purpose, and that purpose could be nothing else than to authorize the Secretary of the Interior to insert in the patent an appropriate clause to save and reserve to the United States those restrictions and conditions of the grant in cases where the records of the land office did not show to what lands those restrictions and conditions applied, and those records would show what lands were occupied by settlers, but would not show what were mineral.

THE GRANT WAS OF LANDS TO THE AMOUNT OF TEN ALTERNATE SECTIONS PER MILE OF ROAD AS STATED IN THE ACT, AND NOT TO THE AMOUNT OF TWENTY ALTERNATE SECTIONS PER MILE OF ROAD AS STATED IN THE PATENT.

In the 3rd section of this act, the words "to the amount of ten alternate sections per mile" specify the amount of land granted per mile of road. The words "on each side of said railroad" specify where the land granted

must be taken. The words "every alternate section of public land, not mineral, designated by odd numbers," prevent the leaving of worthless sections and taking good ones and gives the sections nearest to the line of the road both in primary and lieu limits.

The department admits this construction in that, in the patent, it uses the language "every alternate section of public lands designated by odd numbers to the amount of 20 alternate sections per mile on each side of said road" to describe 20 sections per mile of road—ten to be selected on each side thereof—the identical language used in the statute to describe the lands granted for road built in territories.

The words "on the line thereof, and within the limits of 20 miles on each side of said road," in the patent, are entirely superfluous, tautological and redundant, if "ten" were written lieu of "twenty" in the patent; because the words "every alternate section designated by odd numbers" would necessitate selection of the land on the line of the road. The words "within the limits of twenty miles" were evidently thought necessary, in the patent, because the word "twenty" had been used in lieu of the word "ten," and it was apparent that to give, in the patent, the same meaning to the language "every alternate section of public land to the amount of 20 sections per mile, on each side of said railroad" that was sought to be given it in the act, would amount to a declaration that the railroad company could take, in states, twenty alternate sections on one side of the road and then twenty alternate sections of the other side thereof, which would make "land to the amount of" forty "sections per mile of said railroad," which would reveal the absurdity of

the department's interpretation of the statute. Therefore, the words "and within the limits of twenty miles" were added in the patent, with the result that if the same identical language: "Every alternate section of public land to the amount of twenty alternate sections, on each side of said railroad," is given the same interpretation in the patent that the department gives to it in the statute, the words "and within the limits of twenty miles" are contradictory, because there would not be the quantity of odd numbered sections within twenty miles of the line of the road necessary to give the forty sections per mile called for in the patent. The words "on each side of said road" added in the patent are purely repetition.

Section 6 of the act provides:

"The president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the *entire line of said road,* after the general route shall be fixed, and as fast as may be required by the construction of said railroad." This provides for the making of a survey designed to fix the primary and lieu limits of the grant, and designate, by odd numbers, the sections from which both the granted and lieu lands must be taken, in order that both the granted and lieu lands may be patented to the grantee under the provisions of the 4th section of the statute,—"as fast as every twenty-five miles of said road is completed as aforesaid." This survey was to proceed with the construction of the road, or "as fast as may be required by the construction of said railroad," so that before making the survey of the lands granted the surveyors would know exactly where the line of the road was and make the survey conform to

the grant, and not be obliged to survey a large quantity of lands in excess of those granted, in order to cover the grant by allowing for changes from the general to the definite route of the road.

Now, this survey is to be made, according to the statute, forty miles wide, and is to extend on both sides of the entire line of the road, or twenty miles each way from the line of the road. Such is plainly the survey designed by Congress to cover the lands granted, both primary and lieu, and it covers exactly twenty odd numbered sections of land per mile of road, ten of which fall upon one side of each mile of the road and ten upon the other side. In states the first ten miles each way from the road measure the primary limits of the grant; the second ten miles each way from the road measure the lieu limits of the grant. In territories the survey extends twenty miles each way from the line of the road, the same as in states, and measure the primary limits of the grant in territories, where there are no lieu limits, because the statute requires all lieu lands to be selected "in alternate sections, and designated by odd numbers not more than ten miles beyond the limits of said alternate sections," "nearest to the line of said road" and "within twenty miles thereof," and, after the twenty alternate odd numbered sections per mile of road called for by the patent are taken as the primary lands, granted in territories, all the alternate odd numbered sections therein, within twenty miles, each way from the road, are taken as primary lands, and there are none left in territories from which lieu selections can be made "within twenty miles" of the road. All the alternate odd numbered sections then remaining within twenty miles of the road are within the states,

and are over ten miles and less than twenty miles from the line of the road, where all lieu selections must be made.

That all lieu selections must, under this statute, be made nearest to the line of the road and within twenty miles thereof appears conclusively from the provision in the statute for the selection of "unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road, and *within twenty miles thereof,*" "as above provided," in lieu of mineral lands found in the odd numbered sections within the primary limits of the grant, because this provision read with the language of the act to which the words "as above provided," refer, viz.: "other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." These two provisions read together, as they must be read, clearly define the lieu limits of the grant, within which all lieu land must be selected, as lying and being "not more than ten miles beyond the limits of said alternate sections" (which sections all fall within the primary limits of the grant) and "within twenty miles" of the road.

If the statute be construed to grant, in states. as primary lands, ten alternate odd numbered sections per mile on one side of the line of the road and ten alternate odd numbered sections per mile on the other side thereof, which would make primary lands "to the amount of twenty alternate sections per mile" of road, as stated in the patent, then every alternate odd numbered section "within twenty miles" of the line of the road on both

sides would be necessary to supply the primary lands under such construction of the grant, and whenever any of said alternate sections are "mineral lands" or "shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, no "other lands" could be "selected by said company in lieu thereof under the direction of the Secretary of the Interior in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate section" and "within twenty miles" of the road, because there would be no sections answering this description, *as to location*, after the primary or granted lands were taken.

The grant was therefore of land "*to the amount of ten sections* (approximately 6,400 acres) per mile" of road built within the state of California. (See construction of this statute by Secretary Lamar November 25th, 1887, 6 Land Decisions 351, and Southern Pacific v. United States, 183 U. S. 525.)

This is the only construction of the statute possible.

From the list of selections made by the Southern Pacific and the findings of the officers of the General Land Office, which were presented, with that list, to the secretary, for his approval and certifications, it appeared to him that his approval of that list and the patenting of the lands therein to the Southern Pacific would create an excess over the quantity of lands to which the Southern Pacific was rightfully entitled, because the list of selections number 19 contained 440,900.85 acres of land; the findings of the officers of the General Land Office, which were presented with this list to him for his approval and certifications, recommended the certification and patent-

ing of all of these 440,900.85 acres of land as land accruing to the Southern Pacific for construction of 40,599 miles of road, for the construction of which the Southern Pacific would be entitled to receive but 6,400 acres per mile or 259,577.6 acres, for the whole 40,559 miles, after it completed enough of its road to make up the last section of 25 miles of its road.

Therefore, it appeared to the Secretary of the Interior, upon the face of that list and the findings of the officers of the Land Department, that the certification and patenting of the lands contained in that list would create an excess of 181,323.25 acres over the quantity of lands to which the Southern Pacific could be entitled under its grant, and more, because this 40,559 miles of road were the last miles constructed by that company and it had previously received patents of lands to the amount of nearly 12,800 acres per mile for all of the other 212.32 miles of road constructed under the grant, which fact also appeared from the records of the Interior Department.

Section 7 of the Act of March 3rd, 1887, reads as follows:

> "That no more lands shall be certified or conveyed to any state or corporation or individual for the benefit of either of the companies herein mentioned, when it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such state or corporation or individual would be rightfully entitled."

It is plain that under these circumstances the officers of the Interior Department had no authority or jurisdiction either to certify or patent these lands to the Southern Pacific Railroad.

This being true, both the certification and the patent are absolutely void—not voidable, but void, and were of no force or effect whatever, and no direct proceedings are necessary to cancel or vacate them.

See

Dolan v. Carr, 125 U. S. 618, and cases there cited.

Now, it is true that all the lands in controversy in this suit are within ten miles of the line of the road as fixed by the map of definite location of the road, and that the road was constructed upon that line and that these lands are within the primary limits under the proper construction of the grant.

If the court hold that the patents are void only as to the excess of lands therein described, yet the lands here in controversy must be and are excepted from the operation of the patent, for the reason that, even under such ruling, the question arises: What land shall be held to constitute the excess? The descriptions of lands in these patents purporting to convey only granted or primary lands, include all the lands which could pass under the grant either as primary or lieu lands.

Then we must look to the granting act to determine what particular lands described in the patent must be held to be excess. The act provides:

> "That all mineral lands be and the same are hereby excluded from the operations of this act and in lieu thereof a like quantity of unoccupied unappropriated agricultural lands in odd numbered sections nearest to the line of said road and *within twenty miles* thereof may be selected as above provided."

The patent and the proceedings show that all such lands within twenty miles of the road are included in the patent. Therefore the railroad company loses nothing by not being allowed to hold these mineral lands.

The appellees seek to avoid this difficulty by claiming that they can select as mineral lieu lands those lands within the primary limits of the grant to which some claims had attached, prior to the filing of the map of definite location, and which claims have been abandoned or cancelled. Not to mention the fact that the statute contemplates that both granted and indemnity lands may be selected and patented at the same time, the decisions of the Supreme Court hold that no claim to lands claimed by others before the road was definitely located can be founded on this granting statute.

The Supreme Court has uniformly held that land within the place limits, which had been claimed, reserved or sold prior to the filing of the map of definite location, cannot be taken under the grant, although the United States subsequently obtains full title and the land is freed from such reservations and claims. The language of Justice Miller, in the *K. P. R. Co. v. Dunmeyer,* 113 U. S. 629, is:

> "No such land passes by this grant. No interest in the railroad company attaches to this land or is to be founded on this statute."

And in this same case the court states the reason why Congress intended not to permit any right in the railroad company to attach to such lands.

> "The company had no absolute right until the road was built, or that part of it which came through the land in question. The homestead man

had five years of residence and cultivation to perform before his right became absolute. The pre-emptor had similar duties to perform in regard to cultivation, residence, etc., for a short period, and then payment of the piece of the land. It is not conceivable that Congress intended to place these parties as contestants for the lands with the right in each to require proof from the other of complete performance of its obligations. Least of all, is it to be supposed that it was intended to raise up in antagonism to all the actual settlers on the soil whom it had invited to its occupation, this great corporation with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations."

892. Bardon v. Northern Pacific, 145 U. S. 535 (Justice Field).

In this case a citizen had pre-empted the land, which was an odd numbered section within the primary limits of the grant, before the line of the road was located, and the pre-emption claim was uncancelled at the time of the grant. The pre-emption claim was cancelled after the map of definite location of the road had been filed, and the court says:

"The cancellation only brought it within the category of public lands in reference to future legislation. This, we think, has long been the settled doctrine of this court."

Then the court cites Wilcox v. Jackson, 13 Pt. 498, 513, saying that in that case:

"This court held that wherever a tract of land has been legally appropriated to any purpose, from that moment it becomes severed from the mass of public lands, and no subsequent law, or proclamation, or sale will be construed to embrace it, or to operate upon it, although no reservation of it be

made. The validity and effect of the appropriation do not depend upon its not being subjected afterwards to cancellation because of the omission of some particular duty of the party claiming its benefits."

Cites Hastings & R. R. Co. v. Whitney, 132 U. S. 357, and Leavenworth & R. R. Co. v. U. S. 92, U. S. 733, to the point that land appropriated prior to the time the grant would otherwise attach, would not pass under the grant, although it subsequently became public land.

Then after citing and quoting the Dunmeyer case to the point that lands to which prior claim had attached do not come with these grants after the cancellation of such prior claims, Justice Field continues:

> "Not only does the land once reserved not fall under the grant should the reservation afterwards for any cause be removed, *but it does not then become a source of indemnity for deficiencies in the place limit.* Such deficiencies can only be supplied from lands within limits designated by the granting act or other law of Congress. The land covered by the pre-emption entry being thereby excepted from the grant to the Northern Pacific Railway Company was also excepted from the withdrawals from sale or pre-emption of public lands for its benefit."

This case also holds:

> "The cancellation, as already said, did not have the effect of bringing the land under the operation of the grant to the Northern Pacific Railway Company; it simply restored the lands to the mass of public lands to be dealt with subsequently in the same manner as any other public lands of the United States not covered by or excepted from the grant."

The provisions for selection of indemnity lands are identical in the Northern Pacific and the Southern Pacific grants, with the single exception that the Southern Pacific grant requires lands in lieu of mineral lands found within the primary limits to be selected *within twenty miles* of the road. It is a part of the history of the Southern Pacific grant that when the bill went to the committee on public lands in the house of representatives it provided that lands in lieu of mineral lands should be selected within *fifty* miles of the road, but that committee reported the bill back amended by striking out the word *"fifty"* and inserting in lieu thereof the word *"twenty,"* and the bill so amended became a law.

It will be noticed that the reason given by the court, in the cases last above cited, for not allowing the railroads to claim, under these grants, lands to which a claim or right had attached prior to the filing of the map of definite location was, that to allow it would be to put these great corporatons in position to contest the rights of settlers to acquire the land and to give the railroad companies an incentive to come between the settlers and the government and defeat the settlers' claims to the land. Therefore it was held that Congress intended to remove all possibility of such contests by excepting from the operations of the statute all lands to which any right had attached prior to the filing of the map of definite location; and thereby to deprive these companies of both incentive and power to claim, under the grant, any such lands. Under these decisions it makes no difference if the prior claims were cancelled; even then the railroad company could not claim the land. The lieu selections are subject

to the same limitations as the primary selections with the single exception that they must be made within the lieu limits of the grant.

These reasons given for these decisions by the Supreme Court apply with equal force to primary and indemnity selections. If the company had a right to acquire, as lieu lands, those lands which are within the primary limits of the grant and which it could not acquire as granted, because they had been claimed by settlers before the road was definitely located, then all the reasoning of the court in the cases last cited is at fault and is futile and vain; because by selecting the lands as lieu lands they could force the settler to a contest in the Land Department or in the proper courts to determine whether the land was public land, whether the settler had complied with the law, whether he had abandoned his claim, and whether, in case his claim had been cancelled, the cancellation was lawful, and could contest his right to have his claim to the land reinstated by the government officers. This would allow the railroad company to step between the settler and the government. The court has decided that it was the purpose of the statute to prevent this very thing, and therefore if the court's construction of the statute is correct it is clear that the railroad company never had, under this granting act, any right to select, in lieu of mineral lands, those lands within the primary limits of the grant to which claims had attached before the road was definitely located although such prior claims were cancelled before such lieu selections were made. This being true, there is no possible escape from the conclusion that the primary limits of the grant are ten miles from the line of the road and

that the lieu limits of the grant are twenty miles from the road. This must be true because lieu lands are, under the express terms of the statute, to be selected within twenty miles of the road and not more than ten miles beyond the primary limits. The act contemplates lieu selections for mineral lands which are excluded from the granted land, and the only way they can be selected within twenty miles of the line of the road is by limiting the grant to land "to the amount of * * * ten sections per mile," which is the language of the statute, when the road is built within a state.

THE CERTIFICATION OF THE LANDS IN CONTROVERSY FOR PATENT AND THE PATENTING THEREOF ARE VOID AB INITIO BECAUSE THE LANDS WERE CERTIFIED FOR PATENT AND PATENTED WITHOUT AUTHORITY OF LAW AND IN VIOLATION OF THE ACTS OF CONGRESS.

The fourth section of the granting act and the joint resolution of June 28, 1870, both specify that patent shall issue only for land opposite to and coterminous with each completed section of twenty-five consecutive miles of road constructed. This leaves no possible room for inference that the Secretary of the Interior had authority to cause patents to issue for lands opposite to and coterminous with any section of less than 25 consecutive miles of road constructed until the entire road should be completed.

The cross bill alleges that all of the land in controversy lies opposite to and coterminous with an uncompleted section of 25 consecutive miles of the road, and that the road contemplated in the granting act has never been completed. [R. 128.] The cross bill also sets up a copy

of the application made by the railroad company for patent to these lands, which application expressly shows that the lands applied for are opposite to and coterminous with 40.559 miles of road constructed. [R. 120.] This embraces one section of 25 consecutive miles of road and 15.559 miles of another section. The 15.559 miles of the road were the last miles constructed by the railroad company, and all the land here in controversy lie opposite to and coterminous with them. [R. 128.] The Supreme Court has decided that under such circumstances there was no authority of law for the issuance of a patent for these lands.

Sioux City & St. Paul Railroad Company v. U. S., 159 U. S. 349.

In this case the United States sued to recover lands which had been granted to the state of Iowa by Act of Congress approved May 12, 1864, to aid in the construction of railroads within that state. (13 Stat. 72.) The act provided that

> "When the governor of said state shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner as a first-class railroad, then the Secretary of the Interior shall issue to the state patents for one hundred sections of land for the benefit of the road having completed ten consecutive miles as aforesaid. When the governor of said state shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the Secretary of the Interior shall issue patents to said state in like manner for a like number, and when certificates of the completion of additional section of ten consecutive miles of either of said roads are, from time to time, made as aforesaid, additional sections of land

shall be patented as aforesaid, until said roads, or either of them, are completed, when the whole of the land hereby granted shall be patented to the state for the uses aforesaid and none other."

The railroad company began construction of this road in 1872 at the Minnesota line and completed it southward in the direction of Sioux City for a distance of 56.13 miles. The railroad company claimed that it was entitled to land for the whole 56.13 miles of road constructed, that is for the five sections of ten consecutive miles each, and for the 6.13 miles of another section of ten consecutive miles. The Supreme Court held that the railroad company was not entitled to any land for the construction of the 6.13 miles of road. The court said:

"The company also contends that it was entitled to lands for the whole number of miles of road actually constructed by it, that is, for the fifty miles certified by the governor to have been completed, and also for the fraction of six miles and a quarter immediately north of Le Mars, which was never certified to the Secretary of the Interior. We cannot assent to this construction of the Act of Congress. Congress evidently had in view the construction of an entire road from Sioux City to the Minnesota state line. And to that end the first section of the Act of 1864 grants to the state every alternate section of land designated by odd numbers for ten sections in width on each side of the road. But that section must be taken in connection with the fourth section prescribing the mode in which the grant shall be administered. By the latter section it is provided that the state shall not dispose of the lands granted, except for the purposes indicated by Congress, *and in the manner* prescribed; further, that 'said lands shall not in any manner be disposed of or encumbered except as the same are patented under the provisions of this act.' Now, the manner prescribed for disposing of the lands granted was

that patent should be issued to the state for 100 sections of land for each section of ten consecutive miles, when the governor certified to the completion of such section in good, substantial and workmanlike manner as a first-class railroad. This was evidently the interpretation given by the state to the Act of Congress, for the governor never certified to the construction of any section of road less than ten consecutive miles in length. * * *

"But the time never came when the state could rightfully demand patents for the whole of the lands granted. The road was never completed, and, therefore, patents could not be legally issued except for 100 sections of land for each section of ten consecutive miles of road, certified by the governor of the state to have been constructed in the mode required by Congress. The result of this view is that the Secretary of the Interior was without authority to issue patent, except for the five sections of ten consecutive miles each, that is, for fifty miles of constructed road certified by the governor of the state. The state could not, without completing the road, or causing it to be completed, demand patents on account of the construction of less than a section of ten consecutive miles. This was the view taken by Secretary Lamar, who said that 'a careful consideration of the granting act convinces me that there is no authority of law for patenting any land on account of the six and a quarter miles of road (immediately north of Le Mars), and that no lands had been earned by the construction thereof. 6 Land Dec. 51.'"

The appellees in this case are not in as good position as the Sioux City road was because its patent issued after the Act of March 3, 1887, providing for the adjustments of railroad land grants was passed, and the seventh section of that statute positively forbids the certification or patenting the lands contained in any list for the benefit of a railroad company if such certification and patenting

creates an excess of land over the amount due to be patented. The application of the Southern Pacific Railroad Company for patent of these lands showed that they were claiming in their list lands for 15.559 miles of road for the construction of which they were entitled to no land, therefore the Secretary of the Interior was forbidden to certify the lands contained in the list or to cause patent therefor to issue.

It follows from these observations that the patent and the certification of the land were both void *ab initio*.

IF THE PATENT WAS, AT THE DATE OF ITS ISSUE VOID OR VOIDABLE, FOR ANY REASON, AND HAS BEEN VALIDATED OR CONFIRMED BY ACTS OF CONGRESS, IT HAS BEEN VALIDATED OR CONFIRMED AS A WHOLE AND ITS MINERAL EXCEPTION CLAUSE IS EFFECTIVE TO EXCLUDE MINERAL LANDS FROM ITS CONVEYANCE.

Appellees set up the Act of Congress of March 2, 1896, 29 Stat. 42, and in the court below relied upon the case of the United States v. Chandler-Dunbar Company, 209 U. S. 447, quoting:

> "In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to effect the right, even if in terms only directed against the remedy. Leffingwell v. Warren, 2 Black 599, 605; Sharon v. Tucker, 144 U. S. 533; Davis v. Mills, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See United States v. Winona & St. Peter R. R. Co., 165 U. S. 476."

The language of the opinion in the Dunbar case leaves some room for doubt of the author's meaning as to whether the statute is held, in case of a *void* patent, to create a new grant in the terms of the patent. If it does so hold, we venture the assertion that no other case like it can be found. We believe that the opinion in that case holds that the patent was *voidable* and not *void,* and that it was not the intention of Congress by virtue of any statute of limitations to render a *void* patent valid, but only to cure the defects of *voidable* patents after the expiration of the time limited by the act in case suit to annul the patent was not brought during that period.

Section 8 of the Act of March 3rd, 1891, provides that suits by the United States to vacate and annul any patent theretofore issued shall only be brought within five years from the passage of that act, and that suits to vacate and annul patents thereafter issued shall only be brought within six years after the date of the issuance of such patents.

Section 1 of the Act of March 2, 1896, provides that suits by the United States to vacate and annul any patent to lands theretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of that act, and that suits to vacate and annul patents thereafter issued shall only be brought within six years after the issuance of such patents, and extends accordingly the limitations of the act of March 3rd, 1891, "as to the patents herein referred to."

This act also provides that no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled,

and confirms the right and title of such purchaser. It has no repealing clause.

Assuming that all the patents "erroneously issued" are voidable, and that none of them are void, and assuming also that the act of March 3rd, 1891, would, after the period of its limitation had expired, make a void patent, as well as a voidable patent, good, and, in the case of a void patent, amount to a new grant, what is the effect of these two statutes on a void patent issued under a railroad grant July 10th, 1894?

From these premises it is clear the act of March 2nd, 1896, has reference only to suits by the United States to vacate and annul voidable patents issued under railroad and wagon road grants. It limits the periods in which suits to void such patents may be brought. It left the act of March 3rd, 1891, to limit the periods within which suits by the United States to vacate and annul patents issued under any law other than a railroad or wagon road grant, might be brought. As all patents "erroneously issued" are voidable and not void, and if the case of United States v. Chandler-Dunbar Co., 209 U. S. 447, holds that the statute of March 3rd, 1891, has the effect of validating a void patent against the United States after the period of its limitation has expired, without suit being brought by the United States to vacate or annul it, we are forced to the conclusion that in passing the Act of March 2nd, 1896, Congress intended to accomplish one of two things, namely:

1st. To extend the time in which the United States might sue to avoid a voidable patent, and intended by the same act to let the statute of March 3rd, 1891, validate on the next day a patent which was at the passage of the

Act of March 2nd, 1896, void; or,

2nd. Intended to remove from the operation of the statute of March 3rd, 1891, all imperfect patents, both void and voidable, at any time issued under a railroad or wagon road grant, and allow further time in which to make void by proper suits such of them as were voidable, and leave void such of them as were already void, and not allow the act of March 3rd, 1891, the next day to convert void patents into valid patents, and thus place it beyond the power of the government to do the very thing which the statute of March 2nd, 1896, purports to enable it to do, namely, keep what justly belonged to it.

The only means of escaping from one of these conclusions is to say that Congress never intended that the limitations of either of these statutes should ever apply in any way to void patents, or to state it differently, that Congress did not intend by the passage of either of these acts to make it necessary for the United States to bring suit to make a void patent void in order to get back to itself its own title, which had never passed from it.

In order to arrive at such conclusions, we must say that in the Dunbar case, Justice Holmes, when he speaks of the patent there in question as a void patent, meant that it was voidable, and would be void after the courts declared it to be so. He says:

> "It is said that the instrument was void and hence no patent, but the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents, it would be almost, if not quite, without use."

The "source of the document" is the same, whether it be void or voidable. In mentioning "valid patents" in contradistinction to void patents, the language of the opinion is open to the inference that its writer considered all patents as falling within one of two classes, void or valid, and that there was in his mind at the time no distinction between a void and a voidable patent.

It also appears from the facts set forth in this opinion, that the patent under consideration was held by the court never to have been void. That case arose upon a bill in equity by the United States to remove a cloud upon its alleged title to two islands in the Sault Ste. Marie. The islands, it is said, were but little more than rocks rising slightly above the surface of the water, and stood a short distance from a portion of the shore lying between the ship canal and the rapids. These islands were patented to the defendant by the United States on December 15th, 1883, and the suit to quiet title was heard in the United States Supreme Court at the October term, 1907. It was alleged and admitted by the bill that the bed of the river or strait Sault Ste. Marie passed to the state of Michigan on the 23rd day of June, 1836, and the court, after quoting from the statutes relative to the admission of that state, to the effect that it had no power "to interfere with the sale by the United States and under their authority, of the vacant and unsold lands within the limits of said state," and that said state should "never interfere with the primary disposal of the soil within the same by the United States," the court says:

> "We cannot think that these provisions excepted such lands from the admitted transfer to the state of the bed of the streams surrounding them. If

> they do not, then, whether the title remains in the state or passed to the defendant with the land conveyed by the patent, the bill must fail."

The court then distinctly holds that the patent to the defendant and the laws of Michigan, taken together, operate to transfer the title of the land to the defendant, for the reason that the state had the right to grant lands covered by tidewaters or navigable lakes,

> "when that can be done without substantial impairment of the interests of the public in such waters, and subject to the paramount right of Congress to control their navigation so far as it may be necessary for the regulation of commerce; but it cannot be pretended that private ownership of the bed of the stream or of the islands, subject to the public rights, will impair the interests of the public in the waters of the Sault Ste. Marie."

Under the facts of this case it is difficult to understand how a patent which is admitted to have passed title of the islands "subject to the public rights" for the regulation of commerce, can be said to have been void when such private ownership of the islands is distinctly held not to impair the interests of the public in the waters of the Sault Ste. Marie. If it did impair those interests, such impairment would only render the patent voidable.

The opinion in that case, read as a whole, is not an authority for the proposition that a statute of limitation of suit operates to make valid a patent which is *void* because suit is not instituted to render it *void*. If it was void *ab initio* the judgment of a court could not render it more void than it was before the judgment. If the statute can render a void patent valid it could render valid one which had been rendered void by judgment of a

court, and it would be necessary to keep bringing actions every six years to keep the patent void.

What do the courts mean by saying that, after the limitation of the statute has expired a document must be held to be valid or "good," although it might have been rendered a nullity by proper proceedings instituted before the time limited for bringing suit expired? It cannot be claimed that the document becomes valid because of any change wrought by the statute of limitations in the substantive law from which its infirmities arose. It becomes "good" because the statute renders it impossible for anyone to contradict what appears or purports to have been done by it. The statute simply says that if the import of the document is contrary to the rights of any person, he may have it declared void by proper proceedings instituted within the time limited by the statute; and that if such proceedings are not brought within that time they cannot be brought thereafter. Such statutes do not alter the terms, import of conditions of any conveyance or any document; they do not change the nature or the extent of the estate which the document purports to grant or pass title to. They only make "good" the document as written. The very aim and purpose of such statutes is to forbid and prevent litigants from claiming that records of land titles do not mean what they say or that they are not effective according to their terms and import as written, unless they are altered by proper proceedings within a specified time. The aim of such statutes is so to settle the records of title that a perusal of them would inform every man of his rights in regard to the property to which they relate. Such are

the reasons given in all the cases for the existence, the construction and the application of all such statutes, and from this it necessarily follows that even if the exception of mineral land by appropriate language in the patent was, when made, unauthorized and improperly inserted, the fact remains that it is still there and is a part of appellees' title and cannot now be changed, and is by confirmation of the statute valid according to its import and is effective to keep mineral lands excluded from the operation of the grant; and this is true, the statute of limitations, if applicable, having run, whether, at the date of the patent, it was valid, void or voidable.

It is respectfully submitted that the judgment and decree of the court below should be reversed.

E. J. Blandin and
D. J. Hinkley,
Solicitors for Appellants.